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Supreme Court, U.S.
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In The

Supreme Court of the United States

JAKES, LTD., and RICHARD J. JACOBSON,

Petitioners,

vs.

CITY OF COATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a statute which prohibits the amortization of non-conforming uses in zoning law, but which exempts from that prohibition only businesses presumptively to the protection of the First Amendment, based upon the contents of materials sold or exhibited, subject only to "deferential, rational basis scrutiny" upon constitutional challenge?

2. Regardless of such standard of review, can an exemption from a prohibition on amortization be sustained against a First Amendment challenge, in the absence of any evidence of record that the exemption was adopted for the purpose of addressing adverse secondary effects?

3. In light of this Court's decision in *Alameda Books*, can a zoning regulation amortizing an adult use, defined by content, be resolved on summary judgment, in the face of a genuine issue of material fact as to the ordinance's efficacy in eliminating adverse secondary effects?

4. Can an ordinance licensing presumptively protected First Amendment activities be sustained, when such a license permits suspension at the unfettered discretion of governmental officials?

5. Do Petitioners have standing to challenge an ordinance disqualifying persons convicted of crime from engaging in

protected First Amendment activity, notwithstanding the absence from an allegation that they would be disqualified by such a provision, if the enforcement of such a provision is the justification for disclosure requirements and a license fee?

6. Can government constitutionally impose upon one desiring to exercise First Amendment rights the burden of proving that a license fee as a precondition for the exercise of those rights is unreasonable?

7. In light of *Alameda Books*, can licensing restrictions on First Amendment activities be sustained, in light of undisputed evidence that the effect would be substantial to reduce the availability of constitutionally protected speech?

CORPORATE DISCLOSURE STATEMENT

Petitioner in the above-entitled matter is Jake's Ltd., Inc., a Minnesota corporation. There is no parent or publicaly held company owning more than 10% of the corporation's stock. All parties to the proceeding are listed in the caption.

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Jake's Ltd., Inc., and Richard J. Jacobson, respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit, issued March 26, 2002 (Appendix at A.1-A.14), and for which rehearing was denied on May 3, 2002 (Appendix at A48.)

OPINIONS BELOW

The opinion of the United States Court of appeals for the Eighth Circuit is reported at 284 F. 3d 884 (8th Cir. March 26, 2002), and set forth at Appendix A.1

The initial opinion of the District Court is reported at 169 F. Supp. 2d 1014 (D. Minn. 2001), and is set forth in Appendix at A.15-A.37. The District Court opinion upon motion for amended findings is reported at 176 F. Supp. 2d 899 (D. Minn. 2001), and is set forth in the Appendix at A.38-A.46.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit rendered its judgment on March 26, 2002, and denied a timely petition for rehearing with a suggestion for rehearing en banc, on May 3, 2002. Jurisdiction of this Court is invoked

pursuant to Title 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment 1.

The First Amendment to the United States provides, in pertinent part: "Congress shall make no law...abridging the freedom of speech or of the press..."

Constitution of the United States, Amendment 14.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part: "...nor shall any State deprive any person life, liberty, or property without due process of law..."

Title 42 U.S.C. Sec. 1983.

Title 42 U.S.C. Sec. 1983 provides, in pertinent part: "every person who, under color of state law...subjects or causes to be subjected, any citizen to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law."

Minn. Stat. Sec.462.357, Subd. 1c provides as follows:

> "Except as otherwise provided in this subdivision, a municipality must not enact, amend, or enforce an ordinance providing for

> the elimination or termination of a use by amortization which use was lawful at the time of its inception. This subdivision does not apply to adults-only bookstores, adults-only theaters, or similar adults-only businesses, as defined by ordinance."

Coates City Ordinances 36 and 40 are too voluminous in nature to set forth here. They are contained in the Appendix at A.194-A.230.

STATEMENT OF THE CASE

Petitioners and their predecessors in title have operated Jake's Bar in Coates, Minnesota, since January of 1992.[1] In 1994, the City of Coates enacted ordinance No. 21, by and large relegating so-called "sexually oriented businesses" to the agricultural zone and calling for the amortization of non-conforming uses by December 31, 1996.

In December of 1996, Petitioners commenced an action in Dakota County District Court challenging the constitutionality of the 1994 zoning ordinance, an action which Respondent removed to United States District Court for the District of Minnesota. On April 13, 1998, the United States

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1See complaint, Appendix at A.50.

District Court for the District of Minnesota issued an order and memorandum declaring ordinance No. 21 to be unconstitutional under the First and Fourteenth Amendments to the United States Constitution.[2]

At issue in the instant case are two subsequent ordinances, the first, ordinance No. 40, enacted on July 10, 2000, reenacted the zoning ordinance and called for the amortization of non-conforming uses, of which Petitioners' was the only such use, by January 31, 2001.[3]

The second ordinance, ordinance No.36, called for the licensure of so-called "sexually oriented businesses."

The zoning ordinance, with its amortization provision, was enacted pursuant to Minn. Stat. Sec. 462.357, Subd. 1c, supra, which, as already noted, absolutely prohibits municipalities from enacting, amending, or enforcing municipal ordinances calling for the elimination of non-conforming uses by

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2This history is set forth in the Eighth Circuit opinion, 284 F. 3d at 886-887, Appendix at A.3-A.4. In the interest of brevity, documents in the earlier litigation are not included in the Appendix.

3See Appellant's Appendix at A.223.

amortization, but contains an exemption for "adults-only bookstores, adults-only theaters, or similar adults-only businesses, as defined by ordinance." The complete legislative history of this particular provision, enacted in the 1999 Session of the Minnesota Legislature, is set forth in the Appendix at A.80-A.167. That legislative history indicates that the "adults-only" exception to the ban on amortization was enacted as a floor amendment on the Minnesota Senate on April 8, 1999. Appendix at A.158-A.160. The history of the provision, including the "adults-only" exemption plainly reveals that it was enacted without any evidence whatsoever that "adult uses" cause adverse secondary effects at all, much less any evidence that such uses causes adverse secondary effects which differ in either degree or in kind from other non-conforming zoning uses otherwise subject to amortization.

The record reflects that the City of Coates, in enacting its amortization ordinance, went even further than the Minnesota Legislature, in that it enacted its amortization ordinance in the face of evidence that the only adult use to be amortized, to-wit: Petitioners' establishment, had caused no adverse secondary effects in its eight years of existence. Prior

to enacting the amortization provision with respect to Jake's, the Coates City Council received an uncontradicted report from planner R. Bruce McLaughlin indicating that, for the four- year period from 1992 to 1996, property values in the area of Jake's had increased by 34.83 percent, while property values in the area surrounding the House of Coates, a nearby establishment, had increased by 11.61 percent during the same period. Appendix at A.77-A.78. During the same period of time, Jake's received 19 visits from police, some 14 of which generated police reports, while the House of Coates had 13 police calls, some 9 of which generated police reports. Appellants' Appendix at A.78-A.79. However, virtually the entire difference between Jake's and the House of Coates was attributable to the fact that when Jake's first opened for business in 1992, the current Mayor of the City of Coates posted, and tried to enforce "no parking" signs in front of the establishment, without authorization by any City Council action. Id. at A.79, A.68-A.69.

The only attempt by the City of Coates to dispute the McLaughlin statistics arose out of a memorandum prepared on October 29, 1999, by city attorney Michael Molenda, Appendix

at A.231-A.245, in which Molenda alleged that Jake's was responsible for 44.7 percent of all criminal prosecutions over a five-year period and for some 70 percent of all prosecution costs.

However, in a responsive affidavit by Petitioner Richard J. Jacobson, it was plainly established that those numbers were extremely inflated and distorted. In that affidavit, Petitioner Jacobson points out that of the 17 prosecutions alleged by Molenda to be "Jake's related," five, or nearly one-third, and $5,705.68 of the $9,211.70 in prosecution costs, arose out of a single incident, which resulted in a judgment of acquittal at the end of the state's case. If this single incident were removed from the calculation, there would have been only 33 prosecutions with 12 Jake's-related.

Moreover, in at least 3 of the 12, the relationship to Jake's was strained best. For example, a DWI prosecution was attributed to Jake's because a driver with a stalled vehicle was walking toward Jake's to use the phone; a burglar alarm response was attributable to Jake's, despite the fact that Jake's did not have a burglar alarm at the time; and an incident on March 1, 1999, was attributable to Jake's because it involved

the same Defendant who had struck a motor vehicle in Jake's parking lot 7 months earlier. As a result, if these dubious incidents were removed from the calculation, Jake's would be responsible for only 9 of the 33 criminal prosecution over five years, something not terribly out of the ordinary, given the fact that there are three commercial establishment in the city at which crimes are likely to occur, and Jake's would be responsible for fewer than one-third of those crimes. See Appendix at A.246-A.250.

The licensing ordinance prohibits any person from owning or operating a sexually oriented business without a license.[4]

Under Sec. 508.10, Appendix at A.203-A.204, a license application must be granted, unless one of eight disqualification factors exists, including that the applicant "has had a conviction of a felony or gross misdemeanor relating to sex offenses, obscenity offenses, or adult uses in the past five (5) years..."

Under Sec. 508.17(5), a license may be suspended for up to sixty days if the licensee conducts the business "in such a

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4See Sec. 508.05, Appendix at A.198.

manner as to constitute a breach of the peace or to constitute a menace to the health, safety or general welfare of the community." Appendix at A.211.

The fee for the sexually oriented business license is set in Sec. 2 of the ordinance at $2,000, plus a $500 investigation fee. Appendix at A.213.

Under Sec. 508.12D, with respect to establishments providing live entertainment, among the restrictions imposed are a prohibition against providing entertainment at a distance closer than six feet from a patron, a prohibition against soliciting gratuity or pay from a patron, and a prohibition against a patron giving any gratuity to a performer, Appendix at A.207-A.208.

The record is devoid of any evidence to support a factual basis for any of the foregoing restrictions. Indeed, Molenda's own report plainly indicates that in its years of existence, there has never been a prostitution arrest at Jake's. Appendix at A.231-A.245.

Concerning the impact of these restrictions, the undisputed evidence before the trial court was that such restrictions would be immediate, devastating and substantially restrict the availability of constitutionally protected speech at

Jake's establishment. According to an undisputed affidavit submitted by Appellant Richard J. Jacobson, because of relatively small size of the club, implementation of a six-foot separation requirement between dancers and patrons would eliminate roughly two-thirds of the seating capacity of 120 persons.[5]

Also undisputed was the testimony Paul Bern, an executive with the Deja Vu Corporation, indicating that implementation of such requirements in the State of Washington has resulted in devastating financial losses, Bern indicating that he is not aware of a single adult entertainment establishment anywhere in the United States of America which has been able to operate profitably when confronted with such distance restrictions. Appendix at A.170-A.192.

The District Court upheld the validity of both the "adults-only" exemption to the statutory prohibition against amortization, the zoning provisions, and the licensing provisions. The Court of Appeals affirmed in all respects,

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5See Appendix at A.70. The same affidavit notes that on many occasions, frequently on weekends, the bar is often filled to capacity.

except to find that Petitioners lacked standing to challenge the disqualification from licensure by those with criminal convictions. See 284 F. 3d at 890, Appendix at A.10-A.11.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's decision upholding the "adults-only" xemption from the otherwise absolute prohibition against amortization, on the basis of "deferential rational-basis review,"[6] is directly at odds with every decision with this Court, most notably this Court's recent decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S.___, 122 S. Ct. 1728 (May 13, 2002), holding that such "content correlated" restrictions are, at minimum, subject to intermediate scrutiny. The decision is also in conflict the Eleventh Circuit's decisions in *Ranch House, Inc. v. Amerson*, 238 F. 3d 1273 (11th Cir. 2001), and *Flanigan's Enterprises v. Fulton County, Ga.*, 242 F. 3d 976 (11th Cir. 2001), in that it was enacted with neither findings nor evidence that it was based upon a "secondary effects" rationale.

Likewise, the amortization ordinance itself is in direct conflict with both this Court's decision in *Alameda Books* and

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6284 F. 3d at 889. Appendix at A.9.

the Eleventh Circuit's decision in *Flanigan's Enterprises*, where summary judgment was upheld in the face of a genuine factual dispute as to the evidentiary basis of the city's "secondary effects" determination.

To the extent the licensing provisions permit the suspension of a license in the unfettered discretion of the City Council, they are at odds with the decisions of this Court in *City of Lakewood v. Plain Dealer Publishing Co.*, 485 U.S. 750 (1988), and *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992), and the decision of the Sixth Circuit in *East Brooks Books, Inc. v. City of Memphis*, 48 F. 3d 220 (6th Cir. 1995).

In holding that Petitioners lacked standing to challenge the disqualification provisions of the ordinance, in the absence of a showing that they would be actually disqualified, despite the fact that the disclosure and license fee provisions are directly related to those disqualification provisions, the court's decision is in conflict with the Seventh Circuit's decisions in *Genusa v. City of Peoria*, 619 F. 3d 1203 (7th Cir. 1980), and *Schultz v. City of Cumberland*, 228 F. 3d 831 (7th Cir. 2000).

The court's decision imposing upon Petitioners the

burden of proving the unreasonableness of a license fee which is a precondition for the exercise of First Amendment rights, is directly in conflict with the decisions of this Court in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

Finally, the court's upholding the distance restrictions and prohibitions against gratuities, notwithstanding the undisputed evidence as to the impact it would have in restraining First Amendment rights, is directly contrary to this Court's decision in *Alameda Books*.

I. THE "ADULTS-ONLY" EXEMPTION TO THE OTHERWISE ABSOLUTE PROHIBITION ON AMORTIZATION IS INCONSISTENT WITH DECISIONS OF THIS COURT AND OF OTHER FEDERAL CIRCUITS.

A. ABSOLUTELY NO AUTHORITY EXISTS FOR THE PROPOSITION THAT A "CONTENT CORRELATED" RESTRICTION ON SPEECH CAN BE SUBJECTED ONLY TO "DEFERENTIAL RATIONAL-BASIS REVIEW."

It has long been the law in Minnesota that when a zoning restriction is enacted or amended, rendering an existing use unlawful, preexisting uses rendered unlawful by the zoning

change must be permitted to remain or taken by eminent domain. See, for example, *Freeborn County v. Claussens*, 295 Minn. 96 (1972), and *Oswalt v. Ramsey County*, 371 N.W. 2d 241 (Minn. App. 1985). However, Minnesota courts have recognized that, consistent with the Fifth Amendment prohibition against taking without just compensation, lawful non-conforming uses can be amortized, so long as the amortization period permits the recovery of the property owner's initial investment. See *AVR, Inc. v. City of St. Louis Park*, 585 N.W. 2d 411 (Minn. App. 1998), pet for rev. denied (Minn. Dec. 15, 1998).

In direct response to the *AVR* decision, the 1999 Session of the Minnesota Legislature enacted Minn. Stat. Sec. 462.357, Subd. 1c, absolutely prohibiting the enactment or enforcement of amortization provisions. However, at the 11th hour, an amendment was added thereto, exempting from the otherwise absolute prohibition against amortization "adults-only bookstores, adults-only theaters, and similar adults-only businesses as defined by ordinance." Appendix at A.158-A.160. Thus, the only uses for which amortization were permitted are uses presumptively entitled to the protection of the First

Amendment, premised upon the content of the books, motion pictures, or live entertainment shown on those premises.[7]

In *Alameda Books*, this Court made it absolutely clear that zoning regulation, based upon the content of speech, even assuming it were established to be content-neutral,[8] are subject to intermediate scrutiny, and not deferential, rational basis review. See for example, Justice O'Connor's plurality opinion,

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7In *Alameda Books*, supra, Justice Souter, in his concurring opinion, quite accurately called such restrictions, if not "content-based," at least "content correlated." See 122 S. Ct. at 1746, Souter, J. dissenting.

8In *Alameda Books*, both plurality and dissenting opinion made it clear that content-based regulations are subject to strict scrutiny. See, for example, the plurality opinion's assertion that content-based regulations are "considered presumptively invalid and subject to strict scrutiny." 122 S. Ct. at 1733. See also the dissenting opinion of Justice Souter, stating: "A restriction based on content survives only on a showing of a necessity to serve a legitimate and compelling governmental interest, combined with the least-restrictive narrow tailoring to serve it [Citation omitted.]; since merely protecting listeners from offense at a message is not a legitimate interest of government [Citation omitted.], strict scrutiny leaves few survivors." Id. at 1745, Souter, J., dissenting.

asserting that, "*Renton* requires that municipal ordinances require only intermediate scrutiny if they are content neutral." [Citation omitted.] Id. at 1737.

Likewise, Justice Kennedy, whose concurring opinion provided the necessary fifth vote for the result reached in *Alameda Books*, stated that even though a zoning regulation may be defined in terms of the content of speech:

> "A zoning regulation designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." Id. at 1741, Kennedy, J. concurring.

Finally, Justice Souter, in his dissenting opinion, and suggests that such ordinances stand or fall "on the result of what our cases speak of as intermediate scrutiny..." Id. at 1744, Souter, J. dissenting.

All of these opinions make it clear that the notion that an exemption to an otherwise complete ban on amortization of non-conforming uses, defined solely on the basis of the content of constitutionally protected speech, is to be judged by "deferential, rational basis review" has absolutely no support on this Court.

B. THE ENACTMENT OF THE "ADULTS-ONLY WITHOUT ANY FINDING OR EVIDENTIARY SHOWING TYING IT TO A "SECONDARY EFFECTS" RATIONALE VIOLATES THE FIRST AMENDMENT.

In holding that the Minnesota Legislature could enact a clearly "content correlated" exemption to an otherwise absolute prohibition against amortization of non-conforming uses, without any explicit finding or evidentiary showing that the exemption had its basis in a "secondary effects" theory, the Eighth Circuit rendered a decision clearly at odds with the holding of both the Eleventh Circuit in *Ranch House, Inc. v. Amerson*, supra, 238 F. 3d 1273 (11th Cir. 2001), and of this Court in *Alameda Books*. In *Ranch House*, the Eleventh Circuit stated:

> "We are aware of no case where a court has adopted that proposition or sustained a secondary effects argument in the absence of any indication that the relevant legislative body intended to ameliorate such effects (footnote omitted, emphasis in original). Secondary effects doctrine is an exception to the general rule that a statute which on its face distinguishes among particular types of speech or expression by content is subject to strict scrutiny. [Citations omitted.] Adopting Defendants' broad argument

> would permit the exception to swallow the rule, and would permit the proscription of protected speech far in excess of what the First Amendment allows. Additionally, Defendants argument renders meaningless the rule that '[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.' [Citation omitted.] Under Defendants' argument, a government would have no burden whatsoever to invoke the secondary effects doctrine and thereby obtain lesser judicial scrutiny for legislation restricting First Amendment rights." Id. at 1282-1283.

Secondly, the decision is plainly at odds with this Court's decision in *Alameda Books*.

Of key importance is the following language in the

plurality opinion of Justice O'Connor:

> "In *Renton*,...[w]e held that municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest [Citations omitted.] This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If Plaintiffs fail to

> cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If Plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." [Citation omitted.] Id. at 1736.

Clearly, with respect to the "adults-only" exemption to the otherwise absolute prohibition on amortizing non-conforming uses contained in Minn. Stat. Sec. 462.357, Subd. 1c, the state did not come close to meeting its evidentiary burden.

The State Legislature, in enacting the "adults-only" exemption didn't just rely upon "shoddy data or reasoning," it relied upon no data or reasoning whatsoever. The legislative record is absolutely devoid of any evidence whatsoever that the legislature adopted the "adults-only" exemption to the otherwise absolutely prohibition on amortization for any reason other than objection to the content of the materials shown. This

clearly would not pass the most fundamental test set forth in the O'Connor plurality opinion.[9]

II. THE EIGHTH CIRCUIT'S DECISION IN GRANTING SUMMARY JUDGMENT ON THE AMORTIZATION ORDINANCE ITSELF ACTED CONTRARY TO APPLICABLE DECISIONS OF THIS COURT AND OF OTHER FEDERAL CIRCUITS.

As already noted, supra, in her plurality opinion in *Alameda Books*, Justice O'Connor noted that when a municipality's secondary effects rationale is challenged by proponents of a First-Amendment protected business, either by challenging the

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9To be sure, this standard clearly represents only the stated view of only four justices, to-wit: Justice O'Connor, Chief Justice Rehnquist, Justice Scalia and Justice Thomas. However, it is clear that the four dissenting Justices, Souter, Stevens, Ginsburg, and Breyer, would require a far more stringent evidentiary showing on the part of government. See for example, Id. at 1746-1747, Souter J. dissenting. Consequently, it is clear that the foregoing quotation from the plurality opinion represents the bare minimum which a majority of the United States Supreme Court would require in order to justify an adult entertainment regulation premised on a secondary effects theory. It is clearly the standard which now governs the instant case.

validity of the municipality's evidence, or by producing contrary evidence, the burden shifts to the municipality to produce evidence establishing the validity of its regulation. See *Alameda Books*, 122 S. Ct. at 1736. Likewise, Justice Kennedy, in his concurring opinion, clearly held that such disputes are to be resolved by a trial, and not by summary judgment. See Id. at 1743-1744, Kennedy, J. concurring.

In the instant case, Petitioners produced substantial evidence that its use was causing no adverse secondary effects and had not over eight years of operation. Moreover, when the city attempted to refute that evidence with plainly exaggerated and inflated statistics, Petitioners exposed them. Clearly, under *Alameda Books*, at minimum, a trial was required.

Apart from being plainly inconsistent with this Court's decision in *Alameda Books*, the Eighth Circuit decision is also directly contrary to the Eleventh Circuit's decision in *Flanigan's Enterprises v. Fulton County Ga.*, 242 F. 3d 976 (11th Cir. 2001), where substantial and uncontradicted evidence as to the absence of secondary effects was held to invalidate an ordinance notwithstanding nominal reliance upon virtually the same foreign studies purportedly relied upon by the City of

Coates in the instant case.[10]

III. THE LICENSING PROVISIONS VIOLATE THE FIRST AMENDMENT.

A. PERMITTING THE SUSPENSION OF A LICENSE IN THE UNFETTERED DISCRETION OF MUNICIPAL GOVERNMENT RENDERS THE ORDINANCE UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.

As already noted, supra, the ordinance permits the suspension of an adult entertainment license upon the determination that the licensee conducted its business "in such a manner to constitute...a menace to the health, safety, or

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10In this regard, it should be noted that the instant case is in a far different posture than was *City of Renton v. Playtime Theaters, Inc.*, 457 U.S. 41 1986), in which this Court held that municipalities could reasonably rely upon the results of studies from other jurisdictions. In *Renton*, there were no pre-existing adult uses, and the ordinance was of prospective effect only, making it eminently reasonable to rely upon studies from other jurisdictions. By contrast, Petitioners' use had been present for some eight years at the time the final zoning ordinance was enacted, giving the city extensive local experience in determining whether or not the use was in fact causing adverse secondary effects and thus needed to be amortized. Compare, *XLP Corp. v. County of Lake*, 743 N.E. 2d 162 (Ill. App. 2 Dist 2000).

general welfare of the community," Appendix at A.211, language indistinguishable from that universally held to constitute an unlawful prior restraint since it gives the city unbridled discretion over the exercise of First Amendment rights. Compare *Shuttlesworth v. City of Birmingham*, 395 U.S. 147 (1969); *City of Lakewood v. Plain Dealer Publishing Co.*, supra, 485 U.S. 750 (1988); and *Forsyth County, Ga. v. Nationalist Movement*, supra, 505 U.S. 123 (1993).

The Eighth Circuit attempts to distinguish all of these cases by asserting that a difference exists between allowing the government unbridled discretion to make an initial grant of a license and allowing it unbridled discretion to suspend a license once granted. 284 F. 3d at 890, Appendix at A.10. The Eighth Circuit cites no authority for the proposition that unbridled discretion to suspend a license is immune from First Amendment scrutiny, and the proposition makes no sense. Indeed, the prohibition against unbridled discretion in the granting of a license would be rendered essentially meaningless, if a municipality could exercise unbridled discretion in removing a license once granted. Other courts which have faced this issue have refused to draw such a distinction. Compare *City of*

Colorado Springs v. 2354, Inc., 896 P. 2d 272 (Colo. 1995), and *East Brooks Books, Inc. v. City of Memphis*, supra, 48 F. 3d 220 (6th Cir. 1995), both of which invalidated licensing ordinances, in part, because of the discretion granted to suspend a license to engage in protected First Amendment activities.

The Eighth Circuit also asserts that the ordinance in question is actually "discretion limiting" comparing it to the Minnesota's public nuisance statute, prohibiting a condition, "which endangers the safety, health, morals, comfort or repose of any considerable members of the public." 284 F. 3d at 890, Appendix at A. 10. The more appropriate comparison, however, would be to this Court's decision in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), invalidating a statute prohibiting three or more persons to assemble and "conduct themselves in a manner annoying to persons passing by or occupants of adjacent buildings." The Eighth Circuit does not explain how language which would clearly be declared unconstitutionally vague under decisions of this Court meaningfully limits official discretion.

B. THE EIGHTH CIRCUIT'S DECISION THAT PETITIONERS LACK STANDING TO CHALLENGE THE DISQUALIFICATION PROVISIONS OF THE

LICENSING ORDINANCE IS CONTRARY TO DECISIONS OF THIS COURT AND OTHER FEDERAL CIRCUITS.

To be sure, when the Eighth Circuit held that Petitioners lacked standing to challenge the disqualification provisions in the absence of a showing that they would actually be disqualified thereby, it reached a result similar to that reached by this Court in

FW/PBS v. City of Dallas, 493 U.S. 215 (1990).

However, it is clear that under the rules for standing adopted by this Court, to-wit: the requirement that Petitioners suffer an injury in fact and that the interest sought to be protected is arguably within the zone of interest sought to be protected or regulated by the constitutional guarantee in question,[11] Petitioners' standing is clear. Petitioners plainly suffer injury in fact by the regulation by virtue of the fact that they are required to disclose their criminal history, and are in fact assessed a license fee for the purpose of investigating the criminal history. See Appendix at A.200-A.201, A.213.

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11 See for example, *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 473-477 (1940).

In *Genusa v. City of Peoria*, supra, 619 F. 3d 1203, 1218 (7th Cir. 1980), the court recognized those facts as sufficient to grant standing.[12]

C. THE EIGHTH CIRCUIT DECISION ON THE LICENSE FEE IS CONTRARY TO DECISIONS OF THIS COURT AND OF OTHER FEDERAL CIRCUITS.

As already noted, supra, the licensing ordinance in question imposed a $2,000 license fee and a $150 investigation fee to license a "sexually-oriented business."

Under this Court's decision in *Murdock v. Pennsylvania*, supra, 319 U.S. 105 (1943), this Court clearly held that is was constitutionally impermissible to license the right to engage in activity protected by the First Amendment, and that license fees were plainly limited to that reasonably necessary to defer the municipality's actual expenditures in administering the licensing scheme. Plainly, if the disqualification provisions were invalidated, there would be virtually no expenditures to be reimbursed.

In rejecting Petitioners' arguments, the Eighth Circuit

12The holding of *Genusa* was recently reaffirmed in *Schultz v. City of Cumberland*, supra, 228 F. 3d 831 (7th Cir. 2000).

made two assertions, both of which clearly call for the grant of certiorari. The first is a proposition that *Murdock* does not apply to sexually oriented speech, a proposition for which the Eighth Circuit found no support, and which is clearly contrary to the spirit of this Court's decision in *FW/PBS*, supra, according substantial First Amendment protection to the licensure of sexually oriented speech. 284 F. 3d at 890-891, Appendix at A.11. Secondly, the Eighth Circuit imposed upon the proponents of sexually oriented speech the burden of proving the unreasonableness of the fee, instead of requiring government to prove the reasonableness of the restriction on the First Amendment (Id.), something directly contrary to decisions of this Court, such as *United States v. Playboy Entertainment Group*, supra, 529 U.S. 803, 813 (2000), and of other federal circuits, such as *Busey v. District of Columbia*, 78 U.S. App. D.C. 189, 148 F. 2d 592 (1943).[13]

D. THE DECISION UPHOLDING THE VALIDITY OF THE DISTANCE REQUIREMENTS AND THE PROHIBITION ON GRATUITIES IS IN DIRECT

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13 See also *New York Times, Inc. v. Arizona Board of Regents*, 20 Ariz. App. 422 (1973).

VIOLATION OF THIS COURT'S MANDATE IN *ALAMEDA BOOKS.*

In this case, the Eighth Circuit upheld the validity of a six-foot separation requirement between dancers and patrons, and a prohibition against the payment of gratuities from patrons to dancers, notwithstanding the fact that there was no evidentiary support for the necessity of such requirements, and notwithstanding undisputed evidence that such requirements would eliminate 60% of Petitioners' seating capacity, and that no adult entertainment use anywhere in the United States had been able to operate profitably under such requirements (Appendix at A.70-A.192). Plainly, such a holding, without even the benefit of a trial, is directly contrary to this Court's decision in *Alameda Books*, in particular, Justice Kennedy's concurring opinion, where he wrote the following concerning secondary effects regulations of sexually oriented businesses:

> "In *Renton* , the court determined that while material inside adult bookstores and movie theaters is speech, the consequent sordidness outside is not. The challenge is to correct the latter while leaving the former, as far as possible, untouched. If a city can decrease the crime and blight associated with certain speech

> by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of the speech substantially undiminished, there is no First Amendment objection (emphasis supplied)." 122 S. Ct. at 1739, Kennedy, J. concurring.

Later in his concurring opinion, Justice Kennedy noted that the objective of such legislation was the suppressing of secondary effects, " while leaving the quantity and accessibility of speech substantially intact (emphasis supplied)." Id. at 1742.

Plainly, when a regulation has had the universal effect of running adult entertainment establishments out of business, it plainly does not leave the quantity and accessibility of speech essentially intact. At minimum, there was a factual dispute concerning these regulations mandating a trial under *Alameda Books.*[14]

14Obviously, when the Eighth Circuit rendered its decision in this case on March 26, 2002, and denied rehearing on May 3, 2002, it did not have the benefit of this Court's decision in *Alameda Books*, which was not rendered until May 13. Plainly, an appropriate disposition, if certiorari for argument is not granted is to grant certiorari, vacate the Eighth Circuit's decision and remand it for reconsideration in light of *Alameda Books.*

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be, in all respects, granted.

Respectfully submitted,

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Dated: July 29, 2002

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-1869

Jake's Ltd., Inc.; Richard J. Jacobson,

Plaintiffs-Appellants.

v.

City of Coates,

Defendant-Appellee.

Appeal from the United States District Court for the District of Minnesota

Submitted: November 12, 2001
Filed: March 26, 2002

Before LOKEN, LAY, and HEANEY, Circuit Judges.

LOKEN, Circuit Judge.

Jake's Bar in Coates, Minnesota, has featured live nude dancing since early 1992. Coates is a town of 182 people located fifteen miles southeast of St. Paul. The Coates City Council enacted a zoning ordinance in 1994 that strictly limited the location of sexually oriented businesses. Jake's sued, and the district court declared that the ordinance unconstitutionally infringed the First Amendment protection afforded to nude dancing as a form of expressive conduct. The City then enacted an amended zoning ordinance and a restrictive licensing ordinance. Jake's sued again. Ruling on cross motions for summary judgment, the district judge upheld the current ordinances. Jake's appeals. We modify one portion of the judgment and affirm.

I. Background.

Nude dancing is expressive conduct protected by the First Amendment, "though . . . only marginally so." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (plurality opinion). The Supreme Court has held that state and local laws prohibiting public nudity may constitutionally be applied to businesses such as Jake's, despite the limited First Amendment protection afforded totally nude dancing. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-302 (2000) (plurality opinion); *Barnes*, 501 U.S. at 567-72 (plurality opinion). But the City of Coates elected to proceed differently. Rather than ban public nudity altogether, its 1994 ordinance regulated the time, place, and manner in which Jake's as a sexually oriented business may present live nude dancing to its customers. It is now well-established that this type of regulation is permissible under the First Amendment *provided* the ordinance is justified without reference to the content of the regulated speech, is designed to promote a substantial government interest, and allows reasonable alternate avenues for communication. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-50 (1986). We have applied this test in numerous cases in which various adult entertainment businesses challenged local zoning and licensing ordinances. *See BZAPS, Inc. v. City of Mankato*, 268 F.3d 603, 605 (8th Cir.2001) (nude dancing); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1416 (8th Cir.) (adult bookstore), *cert. denied*, 513 U.S. 1017 (1994); *Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858, 861-63 (8th Cir.) (adult bookstore), *cert. denied*, 513 U.S. 867 (1994); *Holmberg v. City of Ramsey*, 12 F.3d 140, 142 (8th Cir.1993) (adult bookstore and novelty shop), *cert denied*,

513 U.S. 810 (1994); *Alexander v. City of Minneapolis,* 928 F.2d 278, 283-84 (8th Cir.1991) (adult theater).

The 1994 zoning ordinance provided that sexually oriented businesses must be located within an agricultural zone and must be at least 750 feet from specified uses, including other sexually oriented businesses, single- or multi-family dwellings, churches, schools, bars, and public parks. The ordinance also required all nonconforming sexually oriented businesses to cease operations by December 31, 1996. This type of delayed prohibition is known as an amortization provision because it justifies the removal of a nonconforming use by giving the owner a period of time to recoup (amortize) its investment before it must relocate. Jake's present location did not comply with the 1994 ordinance because it is not in an agricultural zone and is less than 750 feet from a residence. Thus, the amortization provision if valid would force Jake's to relocate.

Jake's filed a lawsuit in state court challenging the 1994 ordinance in late 1996. After the City removed, the district court declared the ordinance unconstitutional because the requirement that a portion of any new subdivision of agriculturally zoned land be donated as parkland did not leave any site to which Jake's could lawfully relocate (as the ordinance prohibited Jake's from locating near a public park). However, Judge Richard H. Kyle's opinion further stated:

> [I]f Coates' requirement for land dedication for subdivision were altered either to allow some *non-discretionary* alternative (equivalent fee in lieu of the land dedication) or to limit the land dedication requirement to certain types of subdivision (i.e., subdivisions over a certain size),

> much of the land in the four quadrants [containing possible relocation sites] would be rendered available for a sexually oriented business. The Court sees the discretionary aspect of the waiver of the land dedication requirement to be the only obstacle to Coates' zoning ordinance passing constitutional muster.

Rather than appeal Judge Kyle's decision, the City amended its zoning ordinance to correct this constitutional deficiency by making the parkland dedication requirement nondiscretionary and permitting a developer to make a "cash park dedication" in lieu of dedicating land. The City also enacted a licensing ordinance imposing numerous restrictions on sexually oriented businesses. As relevant to this appeal, the ordinance restricted persons with a criminal history for sex related offenses from obtaining a license, imposed license and investigation fees, required that dancers and patrons be at least six feet apart at all times, and prohibited dancers from soliciting and customers from offering gratuities.

Jake's commenced this action in state court challenging the new zoning and licensing ordinances. The City again removed, and the case was assigned to Judge Donovan W. Frank. On cross-motions for summary judgment, Judge Frank upheld the challenged ordinances but stayed his order pending appeal, thereby permitting Jake's to remain open. *Jake's, Ltd. v. City of Coates,* 176 F.Supp.2d 899, 905-11, and 169 F.Supp.2d 1014, 1017-19 (D. Minn. 2001). Jake's appeals, renewing its challenges to the current zoning and licensing ordinances.

II. Zoning Issues.

City of Renton requires that an ordinance restricting adult entertainment be content-neutral, promote a substantial government interest, and allow reasonable alternate avenues for communication. 475 U.S. at 48-50. Two of those requirements are not at issue in this case. Jake's concedes the ordinances at issue are content neutral. *See also ILQ,* 25 F.3d at 1416 (even if an ordinance regulates only sexually oriented businesses, it is content-neutral "if its purpose is to lessen undesirable secondary effects attributable to those businesses"). And the final aspect of the *City of Renton* test – whether the zoning ordinance allows reasonable alternative avenues for communication – is no longer an issue because Judge Kyle's initial decision told the City how to amend the ordinance to cure a prior defect, the City amended the ordinance accordingly, and Jake's does not argue it has no reasonable alternative site where it may now relocate.

Jake's argues that the Coates ordinance fails the *City of Renton* test because the City had an insufficient evidentiary basis to conclude that its zoning restrictions further a substantial government interest. The ordinance is intended to reduce criminal activity, prevent the deterioration of residential neighborhoods, and eliminate the "dehumanizing influence" that sexually oriented businesses may have on churchgoers, park users, and daycare clients. These are commonly known as the adverse "secondary effects" of adult entertainment enterprises. It is well-settled that a city's interest in preserving the quality of urban life and the character of its neighborhoods justifies zoning restrictions intended to minimize such effects. *See Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71 (1976) (plurality opinion).

In making its secondary effects findings, the City relied on previous studies by Phoenix, Seattle, Indianapolis, Rochester (Minnesota), St. Paul, and the Minnesota Attorney General. The City also relied on a 1999 memorandum by the City Attorney reviewing these studies and reporting that 17 of 38 crimes prosecuted by the City since December 1993 were "Jake's related." Jake's countered with an expert's study opining that the City Attorney erred in attributing many of the 17 crimes to Jake's. Relying on this study, Jake's argues that the police activity due to Jake's is on a par with that at The House of Coates, a local bar that does not have nude dancing, and therefore the City's crime statistics do not support regulating Jake's on the basis of this secondary effect. In addition, pointing to evidence that property values near Jake's have increased in recent years, Jake's argues the City has no evidence that sexually oriented businesses contribute to economic blight. Therefore, Jake's concludes, the City Council had no evidence supporting its conclusion that the zoning ordinance would reduce adverse secondary effects. We disagree.

Leaving aside whether the record is adequate to show the adverse secondary effects of crime and economic blight, Jake's argument is flawed because it ignores the City's reliance on studies showing that proximity to sexually oriented businesses results in adverse secondary effects on residential neighborhoods, churches, schools, and other land uses that would be lessened by an ordinance imposing distance restrictions as great or greater than the 750 foot restriction in the Coates ordinance. The appropriate location of various land users is a prime objective of municipal zoning. And a city need not conduct its own studies to demonstrate that a proposed ordinance will

serve to reduce adverse secondary effects, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *City of Renton,* 475 U.S. at 51-52. *See City of Erie,* 529 U.S. at 297; *Young,* 427 U.S. at 55. We have repeatedly upheld as reasonable the reliance on secondary effects studies from other communities to justify distance restrictions of this type. *See ILQ,* 25 F.3d at 1417-18; *Ambassador Books,* 20 F.3d at 860; *Holmberg,* 12 F.3d at 142.

Jake's argues that this case is like *Flanigan's Enter., Inc. of Ga. v. Fulton County,* 242 F.3d 976 (11th Cir. 2001), *petition for cert. filed,* 70 U.S.L.W. 3091 (July 23, 2001) (No. 01-144), where the court reversed a grant of summary judgment because the County had not reasonably relied on studies from other communities. But *Flanigan's* is distinguishable in two critical respects. First, it involved a total ban on nude dancing in establishments that serve liquor, not a locational zoning restriction. 242 F.3d at 974. Thus, the adverse secondary effects from proximity to churches, schools, and other specific land uses were not at issue. Second, in *Flanigan's,* the County's own studies refuted the presence of the secondary effects on which it relied. 242 F.3d at 986. Here, though Jake's attacks the City's secondary effects findings, the City contends they are supported by the secondary effects evidence, including the City Attorney's 1999 report. Like the district court, we conclude the City relied upon secondary effects evidence it "reasonably believed to be relevant to the problem" it addressed in the zoning ordinance. *City of Renton,* 475 U.S. at 51-52.

Having no viable challenge to the City's zoning restrictions under *City of Renton,* Jake's attacks the

amortization provision in the zoning ordinance. Jake's first argues that the state statute permitting municipalities to use amortization as a means of eliminating nonconforming adult businesses is unconstitutional. *See* Minn. Stat. § 462.357, subd. lc. (2000). This argument is without merit. We have repeatedly upheld amortization provisions requiring nonconforming adult entertainment businesses to relocate as part of a municipality's valid time, place, and manner regulation of such businesses. *See Ambassador Books,* 20 F.3d at 865; *Holmberg,* 12 F.3d at 142, 144; *Alexander,* 928 F.2d at 283-84. Here, the state statute merely authorizes municipalities to amortize nonconforming sexually oriented businesses. The relevant question is whether a municipality's use of that authority complies with the *City of Renton* standards. The State of Minnesota was under no constitutional obligation to study secondary effects in the abstract before granting this authority to local governmental bodies.

Jake's further argues that Coates may not invoke the statutory exception and impose amortization on Jake's because it does not qualify as a "similar adults-only business" under state law. The argument is contrary to the plain language of the statute,[1] but Jake's attempts to avoid

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[1] After prohibiting municipalities from using amortization to eliminate nonconforming uses, Minn. Stat. § 462.537, subd. lc, provides that this restriction "does not apply to adults-only bookstores, adults-only theaters, or similar adults-only businesses, as defined by ordinance." The Coates zoning ordinance defines a sexually oriented business as "an adult book store, adult body painting studio, adult companionship establishment, adult motion picture theater, adult entertainment facility, adult modeling studio, adult mini motion picture theater, or adult sauna" and includes definitions of each type of adult business.

this issue of statutory construction by arguing there is no "constitutional basis" for classifying Jake's as similar to an adults-only business, and the statutory language is in any event unconstitutionally vague. At this point, the argument becomes a jumble of federal and state law concepts. The simple and complete answer is that the Coates zoning ordinance as applied to Jake's passes muster under *City of Renton,* and the state statute permitting amortization of "adults-only" businesses is valid under deferential rational-basis review. Therefore, we affirm the district court's decision that the Coates zoning ordinances regulating sexually oriented businesses (found in Coates Ordinances Nos. 40 and 41) are constitutional.

III. Licensing Issues.

A. Jake's first argues that the licensing provisions in Coates Ordinance No. 36 constitute an unconstitutional prior restraint on free expression. "[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 757 (1988). Jake's does not challenge the provisions in Ordinance 36 governing issuance of an initial license, which impose time constraints on the approval process, require the use of objectively verifiable criteria, and provide for prompt judicial review, the constitutional requirements enumerated in the various opinions in *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 224-27, 239, 246, 249 (1990). Instead, Jake's argues that Ordinance 36 confers unbridled discretion in authorizing the City to *suspend* licenses if a sexually oriented business is conducted "in such a

manner as . . . to constitute a menace to the health, safety, or general welfare of the community."

Jake's cites no authority for the proposition that the prior restraint standards of *City of Lakewood* and *FW/PBS* apply equally to license suspensions and revocations. The proposition is inherently suspect, because license revocation is necessarily less of a *prior* restraint than the initial licensing process. But in any event, we reject as frivolous the contention that an ordinance authorizing revocation if the licensee is "a menace to the health, safety, or general welfare of the community" confers unbridled discretion. This is a specific discretion-limiting standard not unlike the definition of a public nuisance long known to the law. *See, e.g.,* Minn. Stat. § 609.74(1) (defining public nuisance as a condition which "endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public").

Jake's further objects that the license renewal provision does not provide for a stay pending appeal if renewal is denied. Jake's did not raise this issue in the district court, and we decline to consider it.

B. Jake's next argues that Ordinance 36 unconstitutionally provides that a license may not issue to any person who "has had a conviction of a felony or a gross misdemeanor or misdemeanor relating to sex offenses, obscenity offenses, or adult uses in the past five (5) years." A similar restriction was upheld in *DLS, Inc. v. City of Chattanooga,* 107 F.3d 403, 414 (6th Cir. 1997). However, Jake's lacks standing to raise the issue because it made no showing that the restriction will disable its owners from obtaining a license. Therefore, the district court lacked jurisdiction to consider the issue, and we must vacate the

grant of summary judgment upholding this provision in the ordinance. *See FW/PBS*, 493 U.S. at 234-35.

C. Jake's next argues that Ordinance 36 imposes a $2,500 fee that is constitutionally unreasonable. When core First Amendment freedoms are made subject to licensing, only revenue-neutral licensing fees may be imposed so that government is not charging for the privilege of exercising this constitutional right. *See Murdock v. Pennsylvania*, 319 U.S. 105, 115-16 (1943); *Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941). Jake's argues that this principle extends to the licensing of sexually oriented businesses, citing three district court decisions that referred to such fees as implicating "fundamental" rights. *See AAK, Inc. v. City of Woonsocket*, 830 F.Supp. 99, 105 (D.R.I. 1993); *Wendling v. City of Duluth*, 495 F.Supp. 1380, 1384-85 (D. Minn. 1980); *Bayside Enter., Inc. v. Carson*, 450 F.Supp. 696, 704 (M.D. Fla. 1978). In our view, the analogy to *Murdock* and *Cox* does not withstand close analysis in light of the Supreme Court's declaration that nude dancing is "only marginally" protected by the First Amendment.

We recognize that an adult entertainment license fee may be so large or so discriminatory as to demonstrate that it is not content neutral. But in other contexts, the prospective licensee has the burden of establishing that a license fee is unreasonable. *See LCM Enter., Inc. v. Town of Dartmouth*, 14 F.3d 675, 680 (1st Cir. 1994). Jake's offered no evidence on this issue, instead simply arguing that the City had the burden to prove its fee is revenue neutral. On this record, we conclude the district court's grant of summary judgment was proper.

D. Finally, Jake's challenges the provisions in Ordinance 36 requiring that live exotic dancing be conducted on a platform raised at least two feet from the floor and located no less than six feet from any patron, and prohibiting the solicitation or offering of gratuities for the dancers. Several circuits have upheld similar requirements as reasonable, content-neutral time, place, and manner restrictions. *See Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,* 274 F.3d 377, 396-98 (6th Cir. 2001) (three feet); *DLS,* 107 F.3d at 408-13 (six feet); *Colacurcio v. City of Kent,* 163 F.3d 545, 553 (9th Cir. 1998), *cert. denied,* 529 U.S. 1053 (2000) (ten feet); *Kev, Inc. v. Kitsap County,* 793 F.2d 1053, 1061-62 (9th Cir. 1986) (ten feet and no tipping).

Jake's argues that these restrictions are not needed to combat adverse secondary effects in Coates, pointing to the lack of arrests for sex crimes at its establishment. Jake's also contends that distance requirements destroy "individual patron-focused dancing, a separate and distinct medium of communication," relying on expert testimony it presented to that effect. Like our sister circuits, we conclude these restrictions reasonably further the government interest in preventing crime. As the Ninth Circuit observed in *Kev,* 793 F.2d at 1061:

> Separating dancers from patrons would reduce the opportunity for prostitution and narcotics transactions. . . . Preventing the exchange of money between dancers and patrons would also appear to reduce the likelihood of drug and sex transactions occurring on regulated premises. . . . While the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired. (footnotes omitted)

Jake's further argues these provisions would have a disastrous effect on its ability to operate because the six-foot requirement would eliminate two-thirds of the seating capacity of 120 patrons, eliminate customer access to the women's restroom, and require further capacity reductions to permit access to the men's restroom. Under the *City of Renton* standard, Ordinance 36 must afford Jake's a "reasonable opportunity to open and operate." 475 U.S. at 54. The inquiry is not concerned with the economic impact of restrictions on a particular business; instead, "we consider the economic effects of the ordinance in the aggregate, not at the individual level." *DLS,* 107 F.3d at 413. Here, the Coates zoning ordinance is constitutional, so Jake's must relocate. Jake's presented no evidence that it could not design a viable new facility that would satisfy the six-foot requirement. It presented evidence that the no-tipping restriction would reduce profits and adversely affect the income of the dancers, but that evidence fell far short of establishing that Ordinance 36 does not provide a reasonable opportunity to open and operate. Thus, while the short-term financial impact of these restrictions might affect implementation of the zoning ordinance's amortization provision – an issue we do not consider – it does not affect the validity of Ordinance 36.

IV. Conclusion.

The judgment of the district court is affirmed except the portion that declared section 508.10(5) of Coates Ordinance No. 36 constitutional. We modify the judgment to provide that plaintiffs' challenge to section 508.10(5) is dismissed for lack of jurisdiction.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jake's Ltd., Inc.; a Minnesota corporation, and Richard J. Jacobson,

Plaintiffs.

v.

The City of Coates, a municipal corporation,

Defendant.

Civil No. 00-192 (DWF/AJB)

MEMORANDUM OPINION AND ORDER

(Filed Feb. 16, 2001)

Randall D.B. Tigue, Esq., Tigue Law Office, 2940 Pillsbury Avenue South, Suite 200, Minneapolis, Minnesota 55408, appeared on behalf of Plaintiffs.

James J. Thomson, Esq. and Joe Y. Yang, Esq., Kennedy & Graven, 470 Pillsbury Center, 200 6th Street South, Minneapolis, Minnesota 55402, appeared on behalf of Defendant.

Introduction

The above-entitled matter came on for hearing before the undersigned United States District Judge on October 13, 2000, pursuant to Defendant's and Plaintiffs' cross-motions for summary judgment. In the Complaint, Plaintiffs allege that the enactment of certain zoning and licensing provisions is in violation of Minn. Stat. § 462.357, Title 42 U.S.C. § 1983, and the First and Fourteenth Amendments of the United States Constitution. Plaintiffs concede, however, that Counts I and II of their

complaint are moot in light of Defendant's ordinance enactments, on July 10, 2000, subsequent to the initiation of the current litigation. Consequently, Plaintiffs seek attorney's fees and costs with respect to Counts I and II. Defendant counter-claims requesting declaratory and injunctive relief stating that certain relevant ordinances are valid. For the reasons set forth below, Plaintiffs' motion is denied and Defendant's motion is granted.

Background

Richard J. Jacobson is the President and fifty-percent owner of Jake's Ltd., Inc., a Minnesota corporation that operates a business known as Jake's Bar ("Jake's"). Jake's is located at 15981 Clayton Avenue, Coates, Minnesota, a real estate parcel owned by Mr. Jacobson. Jake's has been in operation since January 1992 and has featured and continues to feature live nude dancing. Both Mr. Jacobson and Jake's Ltd., Inc. ("Plaintiffs") have brought suit against the City of Coates ("the City") for enacting zoning and licensing ordinances that allegedly violate the First and Fourteenth Amendments of the United States and Minnesota Constitutions.

In 1994, the City of Coates enacted Ordinance No. 21 which added Section 522 to the City's code for the regulation of "sexually-oriented businesses." At the time of enactment and to date, Jake's is the only business in Coates that qualifies as a sexually-oriented business. In relevant part, Ordinance No. 21 provided that a sexually-oriented business could only be located within an agricultural zone and could not be located within 750 feet of numerous specified structures, including other sexually-oriented businesses, single- or multi-family dwellings,

residentially-zoned property, and public parks. The City's subdivision regulations required that the subdivision of agricultural land for conditional uses, of which the operation of Jake's was one, be subject to the City Council's discretionary requirement that a percentage of the land be dedicated for public park purposes. In addition, Sections 401 and 402 provided that any business in noncompliance with the City's zoning ordinances at the date of enactment "shall be terminated and become illegal on and after December 31, 1996." As of the enactment, Jake's was in violation of the City's zoning laws because it was and continues not to be located within an agricultural district, and it was and remains in violation of the 750 foot distance requirements.

In December 1996, the Plaintiffs brought suit against the City challenging the constitutionality of Ordinance No. 21. Minnesota District Court Judge Kyle found that Ordinance No. 21 was unconstitutional because it did not provide for any space within the City where Jake's could be legally relocated. Judge Kyle found that the provision, as written and in conjunction with the subdivision ordinances, granted too much discretion to the City Council. If the Council required a particular subdivision of agricultural land to designate a percentage to public park development, then a sexually-oriented business could not locate there without violating the 750 foot distance requirement, and therefore, could not locate anywhere legally within the City of Coates. Judge Kyle noted in his opinion that the unconstitutionality of the ordinance could be remedied by providing for a required fee for park development as an alternative to actual land designation. Such a provision shifted the discretion from the City Council to the private land developer.

In 1998, the City enacted two additional ordinances. Ordinance No. 31 established the discretionary fee subdivision provision suggested by Judge Kyle, and it eliminated the mandatory park-land designation requirement. Ordinance No. 32 required that non-conforming sexually-oriented businesses terminate their uses at the existing location by December 31, 1999. These ordinances were intended by the City to address the Plaintiffs' challenges to the earlier ordinances. In enacting Ordinance Nos. 31 and 32, however, the City failed to provide published notice of the relevant public council meeting as required under Minn. Stat. § 462.357, subd. 3.[1] Nevertheless, the Plaintiffs and their council were in attendance at the meeting. In addition, the City did not reenact Ordinance 21 nor include its substantive regulation of sexually-oriented businesses in either of the two new ordinances.

On December 13, 1999, the City enacted Ordinance No. 36 which contained numerous licensing and operating provisions relevant to sexually-oriented businesses. In relevant part, the licensing provisions of Ordinance 36 provide that: (1) within twenty days of receiving a completed license application, the City Clerk must verify all information and conduct any necessary investigation, including the ordering of criminal background checks; (2) within fifteen days after the completion of the verification

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[1] Minn.Stat. Sec. 462.357, Subd. 3 states in pertinent part:

No zoning ordinance or amendment thereto shall be adopted until a public hearing has been held thereon by the planning agency or by the governing body. A notice of the time, place, and purpose of the hearing shall be published in the official newspaper of the municipality at least ten days prior to the day of the hearing.

and investigation, the City Clerk must accept or deny the license application; (3) within twenty days of receipt of notice of the Clerk's decision, an applicant may appeal to the City Council; (4) within twenty days of receipt of the appeal, a hearing before the City Council shall take place; (5) during the application process, an appeal to the City Council, and pending a final determination upon appeal to a court of law, an applicant operating a business not previously subject to the license provisions may remain in operation; (6) an applicant with a criminal history containing a felony or gross misdemeanor relating to sex offenses, obscenity offenses, or adult uses in the past five years shall be ineligible for licensure; and (7) the licensing fee shall be $2,500.00, $2,000.00 for the license and $500.00 for the investigation fee. In addition, one provision imposed a six-foot distance requirement between dancers and patrons. Another provision prohibited dancers from soliciting tips from customers and patrons from providing any gratuity to the dancers.

Plaintiffs initiated the current action on December 29, 1999, challenging Ordinances 31, 32, and 36 on the grounds that: (1) the constitutional deficiency of Ordinance 21 identified by Judge Kyle could not be cured by an amendment to the park dedication provision when the entire ordinance was found to be void; (2) Ordinances 31 and 32 were enacted in violation of the state public hearing requirements contained in Minn. Stat. § 462.357; and (3) the provisions of Ordinance 36 relating to licensing constitute an improper prior restraint on protected expression and those relating to operation were content-based, all in violation of the First Amendment.

On May 18, 2000, the City adopted Ordinance 39 which amended the licensing provisions so that sexually-oriented businesses not previously required to obtain a license could continue to operate pending the judicial outcome of any litigation related to the denial of a license, in addition to any appeals before the City Council. On July, 10, 2000, subsequent to a public hearing on June 12, 2000, the City adopted Ordinances 40 and 41 consistent with state procedural rules. *See* Minn. Stat. § 462.357, subd. 3. In pertinent part, Ordinance 40 replaced Ordinance 21 and extended the amortization period until January 31, 2001, and Ordinance 41 substantively replaced Ordinance 31.

Discussion

1. Standard of Review

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court must view the evidence and the inferences which may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Enterprise Bank v. Magna Bank of Missouri,* 92 F.3d 743, 747 (8th Cir. 1996). However, as the Supreme Court has stated, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy, and inexpensive determination of every action.'" Fed. R. Civ. P. 1. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is

entitled to judgment as a matter of law. *Enterprise Bank*, 92 F.3d at 747. The nonmoving party must demonstrate the existence of specific facts in the record which create a genuine issue for trial. *Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Krenik*, 47 F.3d at 957.

2. Issues

a. Ordinances 40 and 41: Sexually-oriented Businesses and Subdivision

i. Plaintiffs' Motion for Attorney's Fees

Counts I and II are dismissed as moot because of the enactment of Ordinances 40 and 41.[2] Plaintiffs argue, however, that the current litigation prompted the City's action to render such claims moot, and thus, Plaintiffs are entitled to their reasonable costs, disbursements, and attorney's fees under 42 U.S.C. § 1988. The Court disagrees.

Under 42 U.S.C. § 1988, a plaintiff who prevails in its action to enforce a § 1983 claim may be awarded reasonable

[2] Count I claims the illegality of the zoning provisions under state law; and, Count II claims the unconstitutionality of the zoning and amortization provisions.

attorney's fees as part of costs.[3] Because the outcome of claims I and II was determined prior to trial, however, the applicability of § 1988 must be examined under what is known as the "catalyst theory." The "catalyst theory," which has been routinely accepted by the Eighth Circuit posits that "[t]he plaintiff is a 'prevailing party' under section 1988 if his suit is a catalyst for the defendant's voluntary compliance, and the defendant's compliance was not gratuitous, meaning that the plaintiff's suit was neither 'frivolous, unreasonable, [n]or groundless.'" *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1,* 17 F.3d 260, 262 (8th Cir. 1994) (*quoting United Handicapped Federation v. Andre,* 622 F.2d 342, 347 (8th Cir. 1980); *see also Tyler v. Corner Const. Corp., Inc.,* 167 F.3d 1202, 1205 (8th Cir. 1999)) ("The catalyst theory, moreover, has always been advocated ... where the defendant voluntarily granted the requested relief, rendering the lawsuit moot[.]"). A plaintiff, however, must prevail with respect to his or her federal civil rights claim(s) regardless of the outcome of related state law claims. *Warner by Warner v. Independent School Dist. No. 625,* 134 F.3d 1333, 1337 (8th Cir. 1998).

Because only certain counts are moot, the instant case is distinct from those where the voluntary action by the Defendant or a negotiated settlement has rendered the

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[3] 42 U.S.C. § 1988 states in pertinent part that:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, ..., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

entire action moot. Nonetheless, the Court finds the catalyst theory applicable to its analysis here. Given the timing of the lawsuit and the corrective ordinance enactments, it is reasonable to infer that Plaintiffs' lawsuit was the catalyst to the favorable resolution of the relevant claims. The Court finds, however, that Plaintiffs are not eligible for attorney's fees under § 1988 because the issues on which they prevailed were not related to their federal claims under 42 U.S.C. § 1983.

With respect to Plaintiffs' successful procedural challenges brought under Minn. Stat. § 462.357, Plaintiffs are ineligible for fees because they have only prevailed under state law. To the extent that Plaintiffs also challenge the constitutionality of the ordinances, Plaintiffs are also ineligible for fees. While such challenges certainly implicate federal law, Plaintiffs misinterpret the status of the relevant ordinances subsequent to the previous lawsuit and thus, their claim is meritless. Plaintiffs argue that, pursuant to Judge Kyle's decision, Ordinance 21 was unconstitutional and thus, the corrective amendment in Ordinance 31 was also unconstitutional. They contend that the enactment of Ordinances 40 and 41 corrected this discrepancy and was a direct response to their challenge.

To the contrary, Ordinances 40 and 41 were merely an exercise of the City's legislative function. Plaintiffs are correct in stating that Ordinance 21 was void as unconstitutional pursuant to Judge Kyle's decision. Consequently, however, Ordinance 31 was an amendment to an ordinance which effectively did not exist, thus rendering the amendment ineffective as well. Even if the amendment had been enforced against a party, it would not have violated the party's rights because it would have been entirely ineffective or inappropriately, but harmlessly,

enforced as part of a theoretically constitutional ordinance. In essence, the City had no legislation, constitutional or not, covering the substance of Ordinances 21 and 31 from the time of Judge Kyle's decision until Ordinances 40 and 41 were enacted. The City's enactment of the two ordinances was an exercise of its legislative power rather than a purely ameliorative response to Plaintiffs' challenges as they would have the Court believe. Plaintiffs did not prevail on federal claims as they were postured against an unconstitutional ordinance that simply did not exist, and thus, they are not eligible for attorney's fees under § 1983.

ii. Defendant's Motion for Declaratory Judgment

Defendant moves the Court to issue declaratory judgment on whether Ordinances 40 and 41 are constitutional. Defendant contends that Ordinances 40 and 41 are substantively identical to Ordinances 21, 31, and 32 with the addition of the constitutionally ameliorative amendment enacted in response to Judge Kyle's decision. Consequently, Defendant argues that the Court should render its decision relying on the doctrine of collateral estoppel, or alternatively finding that Plaintiffs' constitutional challenges are meritless. On the other hand, Plaintiffs contend that collateral estoppel should not apply here because the pertinent facts and law have changed since Judge Kyle's decision. In addition, Plaintiffs contend that declaratory judgment is inappropriate because, at the time of hearing, no controversy existed given the amortization period through January 31, 2001.

Declaratory judgment is an appropriate remedy when "the facts alleged, under all the circumstances, show that

there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant [its] issuance. . . . " *Sherwood Medical Industries, Inc. v. Deknatel, Inc.*, 512 F.2d 724, 727 (8th Cir. 1975). It is clear to this Court that the parties have adverse legal interests and that, upon expiration of the amortization ordinance, a substantial controversy will result.[4] The immediacy with which and reality that such a controversy will result is apparent from the litigation history between the parties. A clear pattern has developed where Plaintiffs file a claim upon the sunset of whatever provision they are challenging. For these reasons, the Court finds this to be an appropriate case in which to issue a declaratory judgment.

Collateral estoppel is the doctrine which precludes the relitigation of issues previously decided in another lawsuit between the same parties. In order for the Court to rely on collateral estoppel, it would have to find that: (1) the parties to the second lawsuit are the same or in privity with a party to a previous lawsuit; (2) the issue to be precluded is identical to an issue in the prior lawsuit; (3) the issue to be precluded was actually litigated in the prior lawsuit; (4) the issue to be precluded was decided by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior judgment. *Anderson v. Genuine Parts Co., Inc.*, 128 F.3d 1267, 1273 (8th Cir. 1997).

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[4] The Court is aware that given the timing of its decision, the period established by the amortization provision has already expired. Nonetheless, the Court's analysis would be no different had it issued its decision prior to the period's expiration.

It is clear to the Court that the issues and parties before it are identical to those that were fully litigated and decided by Judge Kyle. The only changes effectuated by the enactment of Ordinances 40 and 41 were: (1) the cure of procedural defects; (2) the enactment of a judicially-recommended, constitutionally curative amendment; (3) the extension of an already-existing amortization provision; and, as discussed previously, (4) the enactment of an ordinance mirroring the constitutionally sound provisions of Ordinance 21. The Court finds that issue preclusion is properly applied with respect to Plaintiffs' challenges to Ordinances 40 and 41 as they reflect the substance of previous Ordinances 21 and 31, with the exception of the amortization provision contained in Section 522.

To the extent that Plaintiffs' claims challenge the constitutionality of the amortization provision contained in Ordinance 40, the Court declines to apply collateral estoppel. The Defendant argues that because the amortization was included within Ordinance 21, but invalidation of the entire ordinance was based solely on the subdivision provision, then by implication, the amortization was constitutionally valid. The Court would tend to agree. The Court, however, recognizes that the previous judgment did not directly address the constitutionality of the amortization provision, and thus, will undertake the appropriate analysis at this time.

The Eighth Circuit has upheld a similar amortization provision for sexually-oriented businesses. *Ambassador Books & Video, Inc. v. City of Little Rock, Ark.*, 20 F.3d 858, 865 (8th Cir. 1994) (upholding three-year amortization period for adult businesses). Moreover, the Eighth Circuit has upheld the application of content-neutral restrictions of sexually-oriented businesses when applied to businesses

existing at the time of enactment. *See, e.g., Holmberg v. City of Ramsey,* 12 F.3d 140 (8th Cir. 1993); *Alexander v. City of Minneapolis,* 928 F.2d 278 (8th Cir. 1991). While the current ordinance is less than the three-year term upheld in *Ambassador Books,* it is markedly more than the immediate application upheld in *Holmberg* and *Alexander.* Based on precedent, the Court finds the current amortization provision to be constitutional, and the substantive ordinance provisions to which it applies to be constitutional as well.[5]

Plaintiffs contend that both the facts and law have changed since Judge Kyle's decision. The Court disagrees. Plaintiffs cite *City of Erie v. Pap's A.M.,* 529 U.S. 277 (2000), for the proposition that when a city's actual experience with the secondary effects of a sexually-oriented business is contrary to the generally accepted studies documenting the negative secondary affects of such businesses, then there is no reasonable basis for the enactment of regulations. They contend that this is a change from *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377 (2000), which held that a local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing is a sufficient evidentiary showing to support regulation implicating the First Amendment, and thus, not finding an original, community-specific determination to be necessary.

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[5] The Court need not reach Plaintiffs' severability argument given its finding of the constitutionality of the amortization provision.

Plaintiffs appear to be relying primarily on Justice Souter's dissent in *Erie* where he does question the evidentiary basis required to support the city's enactment of an ordinance banning public nudity and requiring the use of g-strings and "pasties" at nude dancing establishments. *Erie,* 529 U.S. at 310-17. The *Erie* Court found that the city had made its evidentiary showing by implicitly relying on the experiences of other jurisdictions memorialized in the Court's earlier decision in *Renton.* While Justice Souter clearly believes that the Court should have been more demanding of the City, his argument also appears to caution that evidentiary requirements may depend upon the nature of the ordinance at issue and other relevant facts. In a footnote, he states that:

> The nature of the legislating institution might also affect the calculus. We do not require Congress to create a record in the manner of an administrative agency, and we accord its findings greater respect than those of agencies. We might likewise defer less to a city council than we would to Congress. The need for evidence may be especially acute when a regulation is content-based on its face and is analyzed as content-neutral only because of the secondary effects doctrine. And it may be greater when the regulation takes the form of a ban, rather than a time, place, or manner restriction.

Id., at 311, n.1 (citations omitted). Justice Souter's argument pertains to the specific facts of *Erie* and what he saw as a lack of evidence that establishments featuring dancers with pasties would impact the surrounding neighborhoods any differently than those featuring entirely nude dancers. However, the ordinances at issue in the instant case more neatly fit into the category of time, place, and

manner restrictions and thus, do not clearly implicate Justice Souter's concerns.

Nonetheless, the more appropriate application of *Erie* is to follow the majority's opinion which states, unequivocally, that "the evidentiary standard described in *Renton* controls here." *Erie,* 529 U.S. at 297. In *Erie,* the Court found that "the [city] could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood." *Erie,* 529 U.S. at 297. The Court went on to recognize that the City of Erie created findings of its actual experience which the sexually-oriented business failed to rebut, thus providing further evidentiary support for its ordinance. While it had the opportunity to do so, however, the Court did not find such additional evidentiary proof to be necessary.

Under *Erie,* it is clearly appropriate for the City of Coates to have relied on the experiences of other communities and even the discussion of secondary effects discussed in *Renton* in order to justify the enactment of the ordinances at issue. Plaintiffs argue, however, that because, after the original enactments, the City evaluated its own experience in addition to the originally relied upon studies of other communities, then, necessarily, the facts have changed. They go on to state that because they can minimize the City's findings of criminal incidents and prosecutions related to Jake's, then the City's actual experience is, in fact, contradictory to the generally accepted relationship of secondary effects and sexually-oriented businesses. Moreover, Plaintiffs have challenged the characterization of certain findings and attempted to explain statistics as presenting an inflated view of the

number of incidents actually occurring. The Court disagrees. The City was not required to submit findings related to its actual experience. Even subject to Plaintiffs' challenges, the City's findings still present evidence of secondary effects. The law, as it stands, clearly allows a community to reasonably restrict sexually-oriented businesses within it without requiring that the community actually experience the secondary effects such restrictions are authorized to prevent. Thus, Plaintiffs' arguments on this issue must also fail. For the reasons stated, the Court finds Ordinances 40 and 41 to be constitutional.

b. Ordinance 36: Licensing and Other Restrictions[6]

i. Licensing

Plaintiffs challenge the licensing provisions on several grounds claiming that: (1) there is no reasonable time limit to regulate when a criminal background check must be completed; (2) the stay provision insufficiently applies only to businesses not previously subject to the licensing provisions; (3) the requirement of a criminal background check is unconstitutional; and (4) because the licensing

[6] Plaintiffs only briefly address this issue in their Memorandum, yet they incorporate by reference argument on this issue that was included in their briefing papers submitted to a Minnesota state court for a temporary injunction and later to this Court as an attachment to the Defendant's Notice of Removal. While the Court has evaluated all arguments submitted, the Court views the Plaintiffs' action as an improper attempt to circumvent the local rules on length of briefing papers and an inconsiderate, unprofessional affront to the Court and the opposing party.

fees are related to the purported cost of criminal background checks and related costs, the fee itself is also unconstitutional.

Municipalities are generally authorized to maintain licensing schemes in regulation of sexually-oriented businesses. The Supreme Court, however, has determined that without proper safeguards, such schemes can constitute unconstitutional prior restraint on expression. *FW/PBS, Inc., v. City of Dallas,* 493 U.S. 215 (1990). In *FW/PBS,* a majority of the Court held that a proper licensing scheme must provide: (1) a specified brief period of time for any restraint in place prior to judicial review; and (2) expeditious judicial review. *FW/PBS,* 493 U.S. at 1034 (relying on the requirements set forth in *Freedman v. State of Maryland,* 380 U.S. 51 (1965)). There remains a split in the circuits as to whether the Supreme Court's requirement of judicial review refers to a final judicial determination or mere access to the judiciary. *Compare Baby Tam & Co., Inc. v. City of Las Vegas,* 154 F.3d 1097 (9th Cir. 1998) (judicial decision required); *East Brooks Books, Inc. v. City of Memphis,* 48 F.3d 220 (6th Cir. 1995) (judicial decision required); *11126 Baltimore Boulevard, Inc. v. Prince George's County, Md.,* 58 F.3d 988 (4th Cir. 1995), *en banc,* (judicial decision required) *with Boss Capital, Inc. v. City of Casselberry,* 187 F.3d 1251 (11th Cir. 1999) (judicial review sufficient); *TK's Video, Inc. v. Denton County, Tex.,* 24 F.3d 705 (5th Cir. 1994) (judicial review sufficient); *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993), *en banc,* (common law writ of certiorari procedure sufficient); *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.,* 984 F.2d 1319 (1st Cir. 1993) (judicial review sufficient). The Eighth Circuit has yet to address this issue. The Supreme Court had granted certiorari on

this issue, but recently withdrew its grant because the sexually-oriented business in the underlying case withdrew its application for a license rendering the issue moot. *City News and Novelty, Inc. v. City of Waukesha,* 120 S. Ct. 2687 (2000), *cert. dismissed by, City News and Novelty, Inc. v. City of Waukesha,* 121 S. Ct. 743 (2001). Even if a prompt judicial determination is what is required, a municipality can rectify the unconstitutional delay or prior restraint by staying the enforcement of relevant ordinances pending the judicial determination. *11126 Boulevard,* 58 F.3d at 1001 n.18.

Plaintiffs' first and second challenges can be considered together. Simply requiring that a criminal background check be ordered does not guarantee that such investigation will be completed within the reasonable time period constitutionally required and, in this case, found to be provided by the City. The Court recognizes that the City has minimal, if any, control over how quickly a criminal background check will be completed. It is compliance with the second requirement of *FW/PBS,* however, that could remedy this concern and that Ordinance 36 as amended by Ordinance 39 currently provides. Section 509.8 clearly stays the enforcement of the remaining provisions for businesses not previously subject to the licensing provisions of which Jake's is one. Given that the City's licensing scheme is newly enacted and yet to be implemented, there are currently no businesses previously subject to its provisions and thus unprotected by the stay provision.

Plaintiffs express concern that, even if their business were to become licensed, that the City would likely unreasonably revoke the license rendering Jake's unprotected by the stay provision as it now stands. There is no evidence before the Court that the City would revoke a license

without proper grounds. Plaintiffs allege that such evidence can be implied from the alleged grant of unbridled discretion to the City through section 508.17(A)(5), which provides, in part, for suspension of licenses if the licensed business is conducted "in such a manner as to constitute a breach of the peace or to constitute a menace to the health, safety, or general welfare of the community." The Court finds, however, to the extent that this clause is construed to refer to conduct constituting a violation of relevant state law or regulation, such as crimes or regulations pertaining to public health and safety, public misconduct, or nuisance, then the provision is objective and reasonable. *See, e.g.*, Minn. Stat. § 299L, *et seq.* (regulating gambling), 609.66 *et seq.* (crimes against public safety and health), and 609.705, *et seq.* (crimes of public misconduct and nuisance). Plaintiffs' current concerns would be more appropriately directed at the lack of stay protection provided to businesses up for yearly license renewal as set forth in section 508.11. Nonetheless, there are no businesses who currently would be deprived of the procedural protections required under *FW/PBS*. Thus, the Court finds the licensing scheme to be constitutional as currently applied to businesses not previously subject to the licensing provisions.

ii. Criminal History Disqualification Provision

Plaintiffs also challenge section 508.10(5) which establishes an applicant's criminal history as a potentially disqualifying factor. It provides that an applicant with a five-year-old or less felony, gross misdemeanor, or misdemeanor conviction relating to "sex offenses, obscenity offenses, or adult uses" is ineligible for a license. The Court finds the provision to be sufficiently related to the

City's reasonable purpose of limiting the secondary effects of sexually-oriented businesses. *FW/PBS, Inc. v. City of Dallas,* 837 F.2d 1298, 1304-05 (5th Cir. 1988) *aff'd in part and vacated in part on other grounds,* 493 U.S. 215 (1990). With respect to crimes of sex offenses and obscenity offenses, the Court finds there to be a substantial relationship between the nature of the convictions and the secondary effects to be regulated by the ordinance. *Id.* To the extent that the term "adult uses" is construed to refer to state laws prohibiting the operation of certain adult businesses and/or the participation in certain adult activities, such as Minn. Stat. §§ 609.33, 617.33, *et seq.* (regulating disorderly houses and houses of prostitution), the Court also finds a substantial relationship between the nature of the convictions and the secondary effects.

Moreover, the fact that the ordinance includes a five-year time period eliminates the concern that the City is unreasonably and completely eliminating the first amendment rights of a particular group of people. *See City of Paducah v. Investment Entertainment, Inc.,* 791 F.2d 463 (6th Cir. 1986), *cert. denied,* 479 U.S. 915 (1986) (invalidating law requiring revocation of license for distributors of adult-oriented materials upon judicial determination of prior distribution of obscenity); *Genusa v. City of Peoria,* 619 F.2d 1203 (7th Cir. 1980) (invalidating disclosure and disqualification provisions based in part upon prior criminal conduct). While the two may appear inextricably linked, it is clear to the Court that the provision is aimed at regulating the secondary effects rather than the protected expression. The provision is intended to control the crime that is potentially associated with sexually-oriented businesses and reasonably regulates the credentials of those who will be operating and presumably

responsible for preventing the manifestation of secondary effects at their sexually-oriented business. For the reasons stated, the Court finds the disqualification provision to be constitutional and thus, the related disclosure and fee provisions to be constitutional as well.

iv. Distance and Tip Restrictions

Ordinance 36 also prohibits patrons and dancers from being within six feet of each other and from providing or soliciting tips. In their complaint, Plaintiffs challenge the relevant provisions as "impermissible content-based censorship of constitutionally protected speech." During oral argument, Plaintiffs' argument on these issues focused on the financial impact to the business and, ultimately, to the opportunity to maintain a commercial avenue for such expression.

While the law remains uncertain as to the degree of protection nude dancing should receive, the Supreme Court has held that it is indeed a protected form of expression. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (concluding that nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so"). A municipality may regulate a protected form of expression, such as nude dancing, provided that the restriction is content-neutral, reasonably affecting the time, place, and/or manner of the expression. *See Clark v. Community for Creative Non-Violence,* 468 U.S. 288 (1984). A reasonable content-neutral restriction is such that: (1) the regulations are within the constitutional power of the government; (2) the regulations further an important or substantial governmental interest; (3) the governmental interest is unrelated

to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *United States v. O'Brien,* 391 U.S. 367, 376-77 (1968) (establishing test for evaluating restrictions on symbolic speech); *see also Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) (establishing three-factor, content-neutral test for restriction of expression in public forum).[7]

The City of Coates was well within its constitutional powers to manifest its concerns through legislation and to exercise its police powers for the protection of public health and safety. Moreover, the City has a substantial government interest in regulating the industry of sexually-oriented businesses, given the social concerns attendant to such businesses. While the restrictions at issue may affect the manner in which dancing occurs and even limit the overall capacity of a sexually-oriented business, sufficient opportunity remains for the dancers to exercise their protected expression satisfying the requirement that the regulation be narrowly tailored. In fact, the ordinance here is more liberal than other like ordinances that have been upheld by courts. *See, e.g., Colacurcio v. City of Kent,* 163

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[7] The *Ward* test requires a municipal ordinance restricting expression in a public forum to be: (1) content-neutral (2) narrowly tailored to serve a significant government interest; and (3) leaving open ample alternative channels for communication of the information. While the Supreme Court applied this test to a private establishment in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986) and concluded in *Clark v. Community for Creative Non-Violence,* 468 U.S. 288 (1984) that the *Ward* test embodied the principles of *O'Brien,* it nonetheless proceeded to analyze the claims in *Barnes* and later in *Erie v. Pap's A.M.,* 529 U.S. 277 (2000) under *O'Brien.* Thus, the Court will adopt the *O'Brien* test for its analysis here.

F.3d 545 (9th Cir. 1998) (holding ten-foot distance requirement as content-neutral despite elimination of table dancing as form of expression). The Court finds that the provisions here are reasonable time, place, and manner restrictions and thus, not in violation of the First Amendment.

For the reasons stated, **IT IS HEREBY ORDERED THAT:**

1. Plaintiffs' Motion for Summary Judgment (Doc. No. 7) is **DENIED**;

    a. Plaintiffs' request for attorney's fees as to Counts I and II is **DENIED**;

    b. Ordinances 40, 41, and 36 as amended by Ordinance 39 are constitutional.

2. Defendant's Motion for Summary Judgment (Doc. No. 12) is **GRANTED**;

    a. Ordinances 40, 41, and 36 as amended by Ordinance 39 are constitutional.

3. Plaintiff's Complaint (Doc. No. 1) is **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: February 16th, 2001 /s/ Donovan W. Frank
DONOVAN W. FRANK
Judge of United States
District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jake's Ltd., Inc., a Minnesota corporation, and Richard J. Jacobson,

Plaintiffs,

v.

The City of Coates, a municipal corporation,

Defendant.

Civil No. 00-192 (DWF/AJB)

ORDER AND MEMORANDUM

(Filed Mar. 13, 2001)

Randall D.B. Tigue, Esq., Tigue Law Office, 2940 Pillsbury Avenue South, Suite 200, Minneapolis, Minnesota 55408, appeared on behalf of Plaintiffs.

James J. Thomson, Esq., Kennedy & Graven, 470 Pillsbury Center, 200 6th Street South, Minneapolis, Minnesota 55402, appeared on behalf of Defendant.

Order

The current motion before the Court is Plaintiffs' Motion for Amended Findings and for a Stay of the Trial Court's Decision Pending Appeal. In addition, Defendant has requested that the Court revise its February 16, 2001, order to issue an injunction enjoining Plaintiffs from operating a sexually-oriented business at their current location. Both parties' requests are in response to the Court's February 16, 2001, Memorandum Opinion and Order which granted summary judgment in favor of Defendant. For the reasons stated, it is hereby ordered that:

1. Defendant's Request for a Revised Order (Doc. No. 25) is **GRANTED** such that:

a. To the extent that Plaintiffs are in violation of the Court's February 16, 2001, Memorandum Opinion and Order in this matter and relevant ordinances of the City of Coeur, including those found to be constitutional by this Court, Plaintiffs are enjoined from operating a sexually-oriented business at their current location.

b. Except as amended by the above provision and as stayed pursuant to the following provisions of this Order, the February 16, 2001, order of this Court (Doc. No. 21) shall remain in effect.

2. Plaintiffs' Motion for Amended Findings and for a Stay of the Trial Court's Decision Pending Appeal (Doc. No. 23) is **GRANTED IN PART** and **DENIED IN PART** such that:

a. The Court declines to amend its findings issued in the form of its February 16, 2001, Memorandum Opinion and Order; and

b. The Court will stay enforcement of its February 16, 2001, Memorandum Opinion and Order, pending appeal.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 13, 2001

/s/ Donovan W. Frank
DONOVAN W. FRANK
Judge of United States
District Court

MEMORANDUM

1. Plaintiffs' Motion for Amended Findings

Plaintiffs' Motion for Amended Findings is based on Plaintiffs' argument that Minn. Stat. § 462.357, subd. 1c is unconstitutional. Minn. Stat. § 462.357, subd. 1c states that:

> Except as otherwise provided in this subdivision, a municipality must not enact, amend, or enforce an ordinance providing for the elimination or termination of a use by amortization which use was lawful at the time of its inception. This subdivision does not apply to adults-only bookstores, adults-only theaters, or similar adults-only businesses as defined by ordinance.

Plaintiffs maintain that the exemption for adults-only businesses is unconstitutional and severable from the rest of the provision, thus precluding the amortization of all non-conforming uses, regardless of business type. They argue that the exception is overbroad and without an evidentiary basis that such businesses cause adverse secondary effects.

To begin, Plaintiffs failed to raise this argument in any of their briefing papers prior to the hearing on October 13, 2000. Plaintiffs' counsel raised the argument at hearing, providing minimal elaboration to the Court. Since the hearing, however, Plaintiffs' counsel has submitted letters and now a motion addressing this new theory. While the Court certainly supports and encourages conscientious and thorough advocacy, a significant amount of Plaintiffs' argument since the hearing has not rested on newly decided case law. Not only can such submissions compromise a party's compliance with the Local Rules, but they

can also detract from the proven effect of a thorough yet concise distillation of the law truly applicable to a party's case. Even considering its ruling in light of Minn. Stat. § 462.357, subd. 1c, however, the Court finds that its previous decision requires no amendment.

Minn. Stat. § 462.357, subd. 1c was enacted in 1999. As Defendant has pointed out and this Court previously found, however, courts, including the Eighth Circuit, have routinely upheld the amortization of adults-only businesses as constitutional. *See Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858 (8th Cir. 1994); *Holmberg v. City of Ramsey*, 12 F.3d 140, 144 (8th Cir. 1994). The decision of the Minnesota legislature to prevent amortization of other businesses has no impact on the practice with respect to adults-only businesses. In effect, the legislature was officially recognizing and deferring to prior judicial decisions on the issue. By implication, the validity of such an exemption has already been established by the Eighth Circuit and other courts.

To state that the statute is overbroad is also without merit. The only clause that provides breadth to the statute is that which states, "or similar adults-only businesses as defined by ordinance." The clause simply recognizes that a municipality should not be unable to invoke the statute simply because it uses different terms to describe adults-only businesses or because it may host businesses different from theaters or bookstores but subject to the same limited First Amendment protection, i.e. sexually-oriented businesses such as nude dancing establishments. Nonetheless, the clause requires the municipality to define the exempt uses and it is that definition that could ultimately be subject to First Amendment challenge. While the term "similar" generally may not create the brightest of lines, to

argue that it would allow for trucking companies and Dairy Queens to be termed "adults-only" ignores the widely-accepted meaning of the term in the constitutional arena. For these reasons, the Court declines to amend its holding with respect to the constitutionality of the amortization provision.

2. Plaintiffs' Motion for a Stay Pending Appeal

a. Standard of Review

The decision whether to stay a final judgment pending appeal is within the discretion of a trial court. Fed. R. Civ. P. 62(c). If a stay is granted, a court may do so "upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." *Id.* The standards for granting a stay pending appeal are: (1) a strong showing that the appellant will likely prevail on the merits of the appeal; (2) a showing that the appellant will suffer irreparable harm if the stay is denied; (3) a showing that no substantial harm will come to other interested parties if the stay is issued; and (4) a showing that a stay will not harm the public interest. *Hilton v. Braunskill,* 481 U.S. 770, 776 (1987); *Reserve Mining Co. v. United States,* 498 F.2d 1073, 1076-77 (8th Cir. 1974). In essence, a court must balance the equities in light of the circumstance of the particular case. *Reserve Mining,* 498 F.2d at 1077 (noting weighted importance of public health as fourth factor particularly in environmental cases).

b. Likelihood of Success on the Merits

Plaintiffs maintain that they are likely to succeed on appeal, challenging mainly the Court's decision with respect to the amortization and licensing provisions. As

the Court has noted above and in its February 16, 2001, order, there is clear precedent in this Circuit that amortization clauses are constitutional as applied to sexually-oriented businesses. *Ambassador Books & Video, Inc. v. City of Little Rock,* 20 F.3d 858 (8th Cir. 1994); *Holmberg v. City of Ramsey,* 12 F.3d 140, 144 (8th Cir. 1994). The case law cited by Plaintiffs on this issue subsequent to the Court's decision in this case does not challenge the foundation upon which the decision rests.

Plaintiffs cite to *N.W. Enterprises, Inc. v. City of Houston,* 27 F. Supp. 2d 754 (S.D.Tex.1998), for its invalidation of a distance ordinance that was not established to have any potential effect on the adverse secondary effects of sexually-oriented businesses yet was to be applied to established businesses that had relied on the previous, less-stringent distance ordinance. What Plaintiffs fail to discuss about *N.W. Enterprises,* however, is that the court also addressed the application of amortization provisions to sexually-oriented businesses. *Id.* at 817-22. While the issues before the *N.W. Enterprises* court related primarily to the adequacy of the provision and the extension process provided, the court's analysis operated around the principle that amortization provisions were properly applied to sexually-oriented businesses. *Id.* at 817. This Court does not see how *N.W. Enterprises* affects its previous decision other than by perhaps providing further support.

The second case that Plaintiffs cite is *XLP Corp. v. County of Lake,* 2000 WL 33156447 (Ill. App. 2nd Dist. 2000). The issue before the *XLP* court was whether, *on the pleadings,* it could decide the constitutionality of enforcing an ordinance against an already existing sexually-oriented business when the city based its enactment on the experience of other municipalities. In *XLP,* the plaintiff-business

contested such a decision, arguing that the case should go to trial. To the contrary, the parties in this case both sought summary judgment, apparently finding the *XLP* issue irrelevant to the instant facts.

Plaintiffs also cite *Flanigan's Enterprises, Inc. v. Fulton County*, 2001 WL 166375 (11th Cir. Feb. 20, 2001), for its finding that "it was unreasonable for Defendants to rely on remote, foreign studies concerning secondary effects when the county's own current, empirical data conclusively demonstrated that such studies were not relevant to local conditions" when enacting a liquor ban for sexually-oriented businesses. *Flanigan's*, 2001 WL 166375, *8. In its previous order granting summary judgment, this Court found that Ordinance 40 containing the amortization provision mirrors Ordinance 21 which was previously evaluated by Judge Richard Kyle of this District. The evidence of adverse secondary effects for Ordinance 21 was already deemed sufficient by Judge Kyle as discussed in his January 26, 1998, Memorandum Opinion and Order, pp. 8-9, and again cited in his Findings of Fact and Conclusions of Law subsequent to trial, dated April 13, 1998, p. 13.

The Court has found no case law that requires a City to produce new or additional evidence of adverse secondary effects upon the amendment of an ordinance, particularly when the amendment is an update of an amortization provision that had expired pending judicial proceedings and that was deemed substantively constitutional. Moreover, as it explained in its previous order, the Court does not read *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), to require that a city generate its own study of adverse secondary effects. To the extent that the City did so in this case subsequent to its original enactment of

Ordinance 21, the Court found, after considering Plaintiffs challenges, that the results did not contradict the general conclusions already gleaned from the studies of other communities. Even to the extent that Plaintiffs' challenges minimized the degree of the City's findings of adverse secondary effects, evidence of criminal activity remained and, in conjunction with its previous reliance on other studies, provided sufficient basis upon which to amend the ordinance.

Plaintiffs also challenge the Court's decision with respect to the licensing ordinance. After a thorough review of the record, all arguments and submissions of the parties, and being otherwise duly advised in the premises, the Court reached a reasoned conclusion. The Court stands by its earlier decision, yet recognizes the possibility that the Eighth Circuit could disagree. While the Court does not find this factor to weigh strongly in favor of Plaintiffs, in light of the First Amendment implications and the additional factors discussed below, the Court will grant the requested stay.

c. Likelihood of Irreparable Harm to Appellant

The likelihood that Plaintiffs will suffer irreparable harm if the Court were to deny the stay is strong. Without a stay, Plaintiffs would be enjoined from operating the sexually-oriented business, Jake's, at its current location. The potential financial, professional, and personal impact of such an injunction is significant. Moreover, to the extent that Plaintiffs' activity is protected by the First Amendment, Plaintiffs would experience further irreparable harm should an appeal be successful and a stay not have

been granted. Defendant's contention that Plaintiffs could avoid irreparable harm by operating an alternative business in accordance with unchallenged City ordinances is somewhat unrealistic and ignores the First Amendment implications.

d. Likelihood of Harm to Defendant and Public Interest

Because the Defendant represents the City, the third and fourth factors virtually merge. Defendant contends that if a stay is granted, then the City will be harmed by the adverse secondary effects of the sexually-oriented business, especially criminal activity. Correspondingly, the public interest in public health and safety would be implicated. While these two factors certainly argue effectively against granting a stay, the Court finds that the potential irreparable harm tips the balance in favor of a stay. For these reasons, the Court will stay its February 16, 2001, order pending appeal.

Neither party has submitted argument on the issue of whether the Court should require a bond. Defendant has maintained that the injury to be suffered should the stay be granted is the result of adverse secondary effects attendant to Plaintiffs' business. The Court, however, declines to speculate as to the nature and extent of such harm and holds that no bond shall be required upon the stay of this Court's order pending appeal.

D.W.F.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-1869	*	Civil 00-192 (DWF/AJB)
Jake's, Ltd., Inc.; Richard J. Jacobson,	*	
Appellants,	*	Appeal from the United States District Court for the District of Minnesota
vs.	*	
City of Coates,	*	
Appellee.	*	

JUDGMENT

(Filed May 28, 2002)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed as modified in accordance with the opinion of this Court.

(5172-010199) March 26, 2002

A true copy.

ATTEST: Michael E. Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-1869	*	
Jake's LTD., Inc., etc., et al.,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
Appellants,	*	
vs.	*	
City of Coates, etc.,	*	
Appellee.	*	
	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

May 3, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

STATE OF MINNESOTA — DISTRICT COURT
COUNTY OF DAKOTA — FIRST JUDICIAL DISTRICT

Jake's Ltd., Inc. a Minnesota corporation, and Richard J. Jacobson,

Plaintiff,

vs.

City of Coates, a municipal corporation,

Defendant.

COMPLAINT

Court File No.

The above-named Plaintiffs, for their complaint against Defendant, hereby allege the following:

INTRODUCTION

1. This is an action brought pursuant to Title 42 U.S.C. Sec. 1983 and the Constitution of the United States, and in particular under the First and Fourteenth Amendments thereto, this being an action brought to redress the deprivation, under color of state law, statute, ordinance, regulation, custom and usage, or rights, privileges and immunities guaranteed to Plaintiffs under the Constitution of the United States.

PARTIES

2. Plaintiff, Richard J. Jacobson is a citizen of the United States and of the State of Minnesota. He is the owner of a parcel of real property located within the County of Dakota, City of Coates, located at 15981 Clayton Avenue.

He is also the President and 50 percent shareholder of Plaintiff Jake's Ltd., Inc., a Minnesota corporation.

3. Plaintiff Jake's Ltd., Inc., is a corporation organized under the laws of the State of Minnesota. It currently operates a business known as "Jake's," on the real estate owned by Plaintiff Jacobson.

4. Defendant City of Coates is a municipal corporation organized under the laws of the State of Minnesota.

5. Since January of 1992, Plaintiffs and their predecessors in title have operated a business known as Jake's Bar, located at 15981 Clayton Avenue in the City of Coates, Minnesota.

6. Jake's Bar has featured live nude dance entertainment on premises. As such, the activities are presumptively entitled to constitutional protection under the First and Fourteenth Amendments to the United States Constitution, and under Article I, Section 3 of the Minnesota Constitution.

7. During its years of existence, there has been no evidence that Jake's Bar has caused any adverse secondary effects on the surrounding neighborhood, such as a decline in property values, an increase in crime, or urban blight.

8. Until 1994, Jake's was in full compliance with the zoning ordinance of the City of Coates.

9. In 1994, the City of Coates enacted Ordinance No. 21, a copy of which is attached hereto as Exhibit A, adding a Section 522 to the City's Zoning Ordinance regulating so-called "sexually oriented businesses."

10. Under Section 2(65) of the Ordinance, the term "sexually oriented business" is defined as followed:

> "An adult bookstore, adult body painting studio, adult companionship establishment, adult motion picture theater, adult entertainment facility, adult modeling studio, adult mini motion picture theater, or adult sauna."

11. Under Section 2(58), the term "adult entertainment facility" is defined as follows:

> "A building or space wherein an admission is charged for entrance or food or non-alcoholic beverages are served or intended for consumption and wherein may be observed live presentation or entertainment distinguished or characterized by an emphasis on matters depicting, describing, or relating to specified sexual activities or specified anatomical areas as defined herein."

12. Under Section 2(67) the term "specified anatomical areas" is defined as follows:

> "(a) Less than completely and opaquely covered:
>
> (1) Human genitals, pubic region or pubic hair; or
>
> (2) Buttock; or
>
> (3) Female breast or breasts below a point immediately above the top of the areola; or
>
> (4) Any combination of the foregoing; or
>
> (b) Human male genitals in a discernibly turgid state even if completely and opaquely covered."

13. Jake's Bar is an "sexually oriented business" within the meaning of these definitions.

14. The new zoning regulations for sexually oriented businesses were set forth in subparagraph D of the Coates Ordinance as follows:

> (a) Sexually-oriented businesses shall be prohibited in all of the city's use districts detailed in Article II of the City of Coates Zoning Ordinance, except District AG, where such businesses shall be a conditional use subject to the conditions in (b) below and the requirements of Section 710 of the City of Coates Zoning Ordinance.
>
> (b) A sexually-oriented business shall be a conditional use subject to the following conditions:
>
> (1) No sexually-oriented business shall be located closer than 750 feet from any other sexually-oriented business or liquor-serving establishments. Only one sexually-oriented business shall be permitted per building or structure. Measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest point of the actual business premises of the sexually-oriented business to the nearest point of the actual business premises of any other sexually-oriented business.
>
> (b) No sexually-oriented business shall be located closer than 750 feet from any single-family or multi-family dwelling, place of worship, school, public park, state-licensed family day care home, state-licensed group family day care home, or state-licensed child care center. Measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest point of the actual business premises of the sexually-oriented business to the nearest point of the actual premises used as a single-family dwelling, place of worship, school or

park, or state-licensed day care home, state-licensed group family daycare home, or state-licensed child care center. In the case of a single-family or multi-family dwelling located in an area used for agricultural purposes, the premises or the residence thereon shall be defined as the minimum lot size required by the City of Canton Zoning Ordinance.

(2) A sexually-oriented business must be located within one-quarter (1/4) mile of Highway 32.

(4) No sexually-oriented business shall locate in any place which is also used to dispense or consume alcohol.

(5) No sexually-oriented business shall be located in the same building or upon the same property as another such use.

(6) Notwithstanding any other provision of this code, a sexually-oriented business shall not be permitted more than one (1) on-premises sign advertising its business. Such an on-premises sign shall comply with the requirements of Section 519 of the City of Canton Zoning Ordinance. Further, no signs shall contain any flashing lights, moving elements, or mechanically changing messages."

15. At the time the 1994 amendment to the zoning ordinance was enacted, Jabo's became an illegal location for a sexually oriented business, since it was located in a commercial zone, rather than an agricultural zone, and since it was located within 750 feet of both residentially zoned property and a single-family residence.

16. The general policy of the City of Coates concerning uses which are lawful at the time the zoning ordinance is amended are set forth in Sections 401 and 402 of the Coates Zoning Ordinance, a copy of which is attached hereto as Exhibit B:

> "Section 401: Intent.
>
> It is the intent of this Ordinance to permit legal non-conforming uses and structures existing on the effective date of this Ordinance or amendment thereto, to continue until they are removed, but not to encourage their survival.
>
> Section 402: Non-Conforming Uses Buildings.
>
> The lawful use of a building or structure existing at the time of the adoption of this Ordinance may be continued although this use does not conform with the district provisions."

17. However, with respect to sexually oriented businesses, subparagraph F of the 1994 ordinance contained the following provisions:

> "Sexually-oriented businesses which are classified as legal non-conforming uses may continue in accordance with the provision of this Section, except that any such non-conforming use shall be terminated, and become illegal on and after December 31, 1996. To the extent possible, the City shall attempt to identify all such uses which become classified as non-conforming under the provisions of this section and shall notify the property owners and operators of such uses in writing of the change in status, and the terms and conditions which apply. The owner of any property on which an adult use is located may apply to the Council for an extension of the termination date.

Any such application shall be in writing and be received by the City no later than October 1, 1996. Failure to submit a timely extension application shall constitute a waiver of the right to request an exception. The applicant shall have the burden of proof to demonstrate the amortization period as an unreasonable burden upon the business and does not allow adequate time to recover a reasonable return upon the business investment and also the time required for an extension. In making its decision, the Council may consider any fact irrelevant to the issue, including but not limited to:

(a) The degree or magnitude or threat to the public health, safety and general welfare posed by the secondary impacts of the operation.

(b) The length of time that the adult use has been operating.

(c) The ease by which the property could be converted to a conforming use.

(d) The nature and character of the surrounding neighborhood.

(e) The value and condition of the improvements on the property.

(f) The amount of the applicant's investment in the business.

(g) The amount of investment already realized."

18. At the time the 1994 amendment to the zoning ordinance was enacted, Plaintiffs' establishment was the only sexually oriented business of any kind located within the City of Coates.

19. In December of 1996, Plaintiff commenced an action in this Court challenging the constitutionality of the 1994 amendment to the city's zoning ordinance.

20. Defendant, in responding to the lawsuit, removed the lawsuit to the United States District Court for the District of Minnesota.

21. On April 13, 1998, the United States District Court for the District of Minnesota issued an order, memorandum, and judgment, a copy of which is attached hereto as Exhibit C declaring the 1994 amendment to the zoning ordinance, as subsequently amended, to be facially unconstitutional as a violation of the First and Fourteenth Amendments to the United States Constitution.

22. In September of 1998, the City Council of Defendant City of Coates voted to enact two additional ordinances:

a. Ordinance No. 31, a copy of which is attached hereto as Exhibit D, which purported to cure the constitutional deficiency in the zoning ordinance invalidated by the United States District Court in 1998, by eliminating a requirement that a portion of all subdivided land be dedicated for park purposes, available at the discretion of the City Council, making such a waiver mandatory at the discretion of the developer.

b. Ordinance No. 32, a copy of which is attached hereto as Exhibit E, requiring all non-conforming sexually oriented businesses to terminate their uses at the existing location as of December 31, 1999.

23. Plaintiffs' business is the only business affected by the amortization provision.

24. In enacting ordinances No. 31 and 32, Defendant failed to provide either published notice or a public hearing, both of which are required by Minn. State. Sec. 462.357, Subd. 3.

25. On December 13, 1999, Defendant City Council enacted ordinance No. 36, a copy of which is attached hereto as Exhibit F and incorporated by reference as if fully set forth herein.

26. In enacting ordinance No. 36, Defendant City of Coates acted under color of state law, statute, ordinance, regulation, custom and usage, within the meaning of Title 42 U.S.C. Sec. 1983.

27. Pursuant to Sec. 508.05 of said ordinance, no person shall own or operate a "sexually oriented business" without a license issued pursuant to the ordinance. The term "sexually oriented business" adopts the definition contained in the zoning ordinance, invalidated by the United States District Court in the earlier federal litigation.

28. Consideration of the application for a license is governed by Secs. 508.07 and 508.08. Sec 508.07(B) provides as follows:

> "Applications for licenses under this Article shall be submitted to the City Clerk. Within twenty (20) days of the receipt of a completed application and payment of all licensing application fees, the City Clerk or designee shall verify any and all of the information requested of the applicant, including the ordering of criminal background checks and conduct any necessary investigation to assure compliance with this part."

29. Sec. 508.08 of the ordinance provides as follows:

"No later than fifteen (15) calendar days after the completion of the license application verification and investigation by the City Clerk, as prescribed in 508.07, the City Clerk shall accept or deny the license application in accordance with this part. If the application is denied, the City Clerk shall notify the application of the determination in writing. The notice shall be mailed by certified and regular mail to the applicant at the address provided in the application form and it shall inform the applicant of the applicant's right, within twenty (20) calendar days of receipt of the notice by the applicant, to request an appeal of the City Clerk's determination to the City Council or to immediately challenge the determination in the court of law. If an appeal to the City Council is timely received by the City Clerk, the hearing before the City Council shall take place within twenty (20) calendar days of the receipt of the appeal by the City Clerk. If an application is granted for a location where a building is under construction or not ready for occupancy, the license shall not be delivered to the licensee until a certificate of occupancy has been issued for the licensed premises. During the application consideration process described herein, an applicant operating a business not previously subject to the license provisions of this Park may remain operating pending the outcome of the application consideration."

30. Sec. 508.10 of the ordinance provides as follows:

"The City Clerk shall issue a license under this Part to an applicant unless one (1) or more of the following conditions exist:

(1) The applicant is a minor at the time the application is submitted;

(2) The applicant failed to supply all of the information requested on the license application;

(3) The applicant gave false, fraudulent, or untruthful information on the license application;

(4) The applicant had a sexually oriented license revoked within a one (1) year immediately preceding the date the license application was submitted;

(5) The applicant has had a conviction of a felony or gross misdemeanor or misdemeanor related to sex offenses, obscenity offenses, or adult uses in the past five (5) years;

(6) The sexually oriented business does meet all the zoning requirements prescribed in the City of Coates Zoning Code. This provision shall not apply to a business existing at the time this Part and ordinance is [sic] enacted which is not yet required to comply with the Coates Zoning Code;

(7) The premises to be licensed is sexually-oriented business is currently licensed by the City as a tanning facility, tattoo establishment, pawn shop, therapeutic massage enterprise, or an establishment licensed to sell alcoholic beverages;

(8) The applicant has not paid the license an investigation fees required;

30. Under Sec. 101.03 of the Coates City Code, as amended by ordinance No. 36, the annual license fee is two thousand dollars, plus an investigation fee of five hundred dollars.

31. Under the provisions of Sec. 508.17(a)(5), a sexually oriented business is subject to suspension for up to sixty days if the City Council determines that the licensee has conducted the licensed business "in such a manner as to constitute a breach of the peace or to constitute a menace to the health, safety or general welfare of the community."

32. Under Subparagraph (b)(10), the license is subject to permanent revocation, in the event that the licensee "is delinquent in payment to the City, County, State, or Federal Governments for hotel occupancy taxes, ad valorem taxes, sales taxes, or other government imposes financial obligation."

33. With respect to live entertainment, the ordinance contains the following restrictions:

> "(1) All performers, dancers, and persons providing live entertainment distinguished or characterized by an emphasis on matters depicting, describing, or relating to special specified sexual activities, or specified anatomical areas in licensed facilities or in areas adjoining the licensed facility where entertainment can be seen by patrons or customers shall:
>
> (a) provide social entertainment on a platform intended for that purpose which is raised at least two feet from the level of the floor;
>
> (b) provides said entertainment at a distance no closer than six (6) feet to any patron;
>
> (c) not fondle or caress any patron;

(d) not solicit any pay or gratuity from any patron;

(2) No patron, customer, or spectator of a licensed facility providing live entertainment distinguished or characterized by an emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical areas shall:

(a) fondle or caress any performer, dancer or other person, providing live entertainment;

(b) directly pay or give any gratuity to any performer, dancer or other person providing live entertainment."

COUNT I – ILLEGALITY OF ZONING PROVISION UNDER STATE LAW

34. Plaintiffs reallege the allegations set forth in paragraph 1-33, *supra*.

35. Ordinances No. 31 and 32, purportedly requiring the amortization of Plaintiff's use by December 31, 1999, are unlawful under state law for the following reasons:

a. The provisions were unlawfully enacted, due to Defendant's failure to comply with the published notice and public hearing provisions of Minn. Stat. Sec. 462.357, Subd.3.

b. Because, as a matter of state law, the judicial determination that ordinance No. 21 was facially unconstitutional rendered said ordinance void *ab initio*, even assuming Ordinance No. 31 corrected its constitutional

deficiencies, said purported correction would have no force in effect in the absence of the reenactment of the substantive provisions of ordinance No. 21, which did not occur.

c. The ordinance violates Minn. Stat. Sec. 462.357, Subd. 1c, in that municipalities are prohibited thereby from enforcing an ordinance providing for the elimination or termination of a use by amortization which use was lawful at the time of its inception.

36. In the event it is determined that Plaintiffs' use falls within the exception provided for "adults only bookstores, adults-only theaters, or similar adults-only businesses, as defined by ordinance," then said exception is facially unconstitutional under the First and Fourteenth Amendments to the United States Constitution, and the unconstitutional exception is severable from the remainder of the statute.

COUNT II – UNCONSTITUTIONALITY OF ZONING AMORTIZATION PROVISIONS

37. Plaintiffs reallege the allegations set forth in paragraphs 1-36, *supra*.

38. Even assuming ordinances No. 31 and 32 were otherwise valid under state law, the amortization provision would violate the First Amendment for the following reasons:

a. Because the amendment to the park dedication ordinance was never lawfully enacted under Minnesota law, the zoning ordinance remains unconstitutional for the reasons already determined by Judge Richard Kyle in the prior federal litigation.

b. The amortization provision was enacted without an empirical basis for believing that Plaintiffs' business caused adverse secondary effects and was thus content-based censorship.

c. Enforcement of the ordinance would have the effect of suppressing, or greatly reducing access to constitutionally protected speech, in violation of the First and Fourteenth Amendments to the United States Constitution.

d. The ordinance, if implemented, would not have the effect of reducing adverse secondary effects; rather, adverse secondary effects would be either unaffected or exacerbated by implementation of the ordinance.

COUNT III – UNCONSTITUTIONALITY OF LICENSING PROVISIONS

39. Plaintiffs reallege the allegations set forth in paragraphs 1-38, *supra*.

40. Ordinance No. 36, governing the licensure of sexually oriented businesses is facially unconstitutional and unconstitutional as applied to Plaintiff for the following reasons:

a. The ordinance lacks a legitimate public purpose and is therefore an unlawful prior restraint on freedom of expression.

b. The ordinance vests impermissible discretion in municipal government to censor the exercise of rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

c. The ordinance fails to provide the procedural due process necessary for the licensing of constitutionally protected speech.

d. The disqualification based upon prior criminal convictions for license revocation is an unlawful prior restraint on freedom of expression.

e. The disqualification for tax delinquency is an unlawful prior restraint of freedom of expression.

f. The license fee provision constitutes an unlawful prior restraint on constitutionally protected expression.

g. The prohibition against providing gratuity to entertainers and a six (6) foot separation requirement constitute an impermissible content-based censorship of constitutionally protected speech.

41. As a result, Plaintiffs are entitled to a declaratory judgment invalidating, both facially and as applied, ordinances No. 31, 32 and 36.

EQUITY AND IRREPARABLE INJURY

42. Plaintiffs reallege the allegations set forth in paragraphs 1-41, *supra*.

43. Under the provisions of the ordinances, on their face, violation of either the zoning or licensing provisions are criminal offenses subjecting Plaintiffs to misdemeanor criminal penalties of up to 90 days imprisonment and $700 fine.

44. As a result, Plaintiffs face irreparable injury, as a matter of law, in that they are required to choose between

the exercise of First Amendment rights on the one hand, and criminal prosecution on the other hand.

45. As a result, Defendants have no adequate remedy at law, and are entitled to a temporary and permanent injunction enjoining and restraining the enforcement of said provisions.

WHEREFORE, Plaintiffs request that judgment and decree of this Court as follows:

a. That this Court issue a declaratory judgment declaring Coates City Ordinances No. 31, 32, and 36 to be void under state law and/or facially unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

b. That this Court issue a temporary and permanent injunction, and until a hearing can be had on a motion for temporary injunction, a temporary restraining order, restraining and enjoining said Defendants from enforcing said ordinances against Plaintiff.

c. That Plaintiffs be awarded their reasonable costs, disbursements, and attorney's fees, pursuant to Title 42 U.S.C. 1988.

d. That the Court grant such other and further relief as it may deem just, fair and equitable.

RANDALL TIGUE LAW OFFICE, P.A.

/s/ Randall D.B. Tigue
Randall D.B. Tigue
Atty ID No. 110000
Attorney for Plaintiffs
Karmel Square Bldg.,
Elroy St. Entrance
2940 Pillsbury Avenue South
Minneapolis, MN 55408
612/825-0936

Dated: December 30, 1999

ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to *Minn. Stat. Sec.* 549.21, Subd. 2, to the party against whom the allegations in this pleading are asserted.

/s/ Randall D.B. Tigue
Randall D.B. Tigue
Attorney for Plaintiffs
Karmel Square Bldg.,
Elroy St. Entrance,
Suite 200
2940 Pillsbury Avenue South
Minneapolis, MN 55408
Telephone: (612) 825-0936

Dated: December 30, 1999

VERIFICATION

Richard J. Jacobson, being first duly sworn on oath, hereby deposes and says that hee [sic] has an individual Plaintiff, as well as President of the corporate Plaintiff, Jake's Ltd., Inc., in the above-entitled matter, that he has read the foregoing Complaint, and that the allegations contained therein are true, except as to those matters stated upon information and belief, and that, with respect to such matters, he believes them to be true.

/s/ Richard J. Jacobson
Richard J. Jacobson

Subscribed and sworn to before
me this 30th day of December, 1999.

/s/ Michelle Hreha
Notary Pubic

[SEAL] MICHELLE A. HREHA
NOTARY PUBLIC – MINNESOTA
HENNEPIN COUNTY
My Commission Expires Jan. 31, 2000

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

Jake's Ltd., Inc. a
Minnesota corporation,
and Richard J. Jacobson,

Plaintiff,

vs.

City of Coates, a
municipal corporation,

Defendant.

AFFIDAVIT OF RICHARD J. JACOBSON

Court File No.

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Richard J. Jacobson, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is the individual Plaintiff in the above-entitled matter, owning the real estate on which Jake's is located.

2. Your affiant is also the president and 50% shareholder of the corporate Plaintiff, Jake's Ltd., Inc.

3. Your affiant has been involved in the operation and/or management of Jake's, almost since its inception in 1992.

4. When Jake's first opened for business, it was targeted for harassment by members of the Coates City Council.

5. Current Mayor Jack Gores, without the benefit of formal City Council action, posted "no parking" signs

immediately in front of Jake's. These were the only "no parking" signs located anywhere within the City of Coates and were obviously placed there for no other purpose than to disrupt the business of Jake's.

6. Customers irate over being singled out for no parking, and receiving parking tickets, often reacted by knocking the signs down, only to have Mr. Gores personally put them back up again.

7. It was this controversy, generated solely because of the unilateral action of members of the Coates City Council, which accounts for a substantial of number of police calls to Jake's mentioned in Mr. McLaughlin's position statement, and virtually the entire difference in the number of police calls between Jake's and the House of Coates.

8. After ordinances No. 31 and 32, seeking to amend the Coates Zoning Ordinance to salvage the constitutionality of the adult entertainment zoning provisions, invalidated by the United States District Court in April of 1998, were introduced for first reading, your affiant personally read every issue of the Hastings Gazette, which is the designated legal newspaper for the City of Coates, seeking to find notices of public hearing, as mandated by Minn. Stat. Sec. 462.357, Subd. 3. No such notices were ever published.

9. Your affiant also personally attended every meeting of the City Council between introduction and passage of ordinances No. 31 and 32.

10. No public hearing, as mandated by Minn. Stat. Sec. 462.357, Subd. 3, was ever held with respect to either of those ordinances, although both ordinances constituted

amendments to a zoning ordinance, within the meaning of state law.

11. Your affiant also notes that, introduced contemporaneously with ordinance No. 36 and 37, concerning the licensure of adult entertainment businesses, was ordinance No. 34, a copy of which is attached hereto Exhibit A. This ordinance does nothing except repeat the distance and location requirements contained in the original zoning ordinance, which was held unconstitutional by Judge Kyle in April of 1998.

12. Your affiant has also attempted to determine the impact of the six-foot separation requirement mandated by the licensing ordinance.

13. If a tape measure were taken from the existing stage and six-feet measured off in all directions, as it would have to be under the terms of the ordinance, the impact on your affiant's business would be devastating.

14. Your affiant's current seating capacity in the stage area where the dancers perform is approximately 120. There are many occasions, frequently on weekends when the bar area is in fact filled to capacity.

15. A six-foot separation requirement from the existing stage would eliminate roughly two-thirds of that seating capacity.

16. It would also render the women's restroom inaccessible to female customers.

17. It would eliminate even more of the seating capacity, if patrons are seated at the bar, and an aisle to and from the men's restroom to enable an exit to the door were added.

18. Your affiant executes this affidavit in support of the attached motion for temporary injunction and temporary restraining order.

/s/ Richard J. Jacobson
Richard J. Jacobson

Subscribed and sworn to before
me this 30th day of December, 1999.

/s/ Michelle Hreha
Notary Pubic

[SEAL] MICHELLE A. HREHA
NOTARY PUBLIC – MINNESOTA
HENNEPIN COUNTY
My Commission Expires Jan. 31, 2000

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

Jake's Ltd., Inc. a Minnesota corporation, and Richard J. Jacobson,

Plaintiff,

vs.

City of Coates, a municipal corporation,

Defendant.

AFFIDAVIT OF RANDALL D.B. TIGUE

Court File No.

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Randall D.B. Tigue, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is the attorney for Plaintiffs in the above-entitled matter.

2. Your affiant was also the attorney for Plaintiffs in the prior litigation commenced in this court and later removed to the United States District Court for the District of Minnesota, which resulted in the original Coates Adult Entertainment Zoning Ordinance, ordinance No. 21 being declared unconstitutional by United States District Court Judge Richard Kyle.

3. Coates Mayor Jack Gores and several other members of the Coates City Council attended the trial.

4. Your affiant further directed his planning expert who testified at trial, R. Bruce McLaughlin of Indian

Rocks Beach, Florida to mail to the Mayor and all members of the City Council a position statement reflecting Mr. McLaughlin undisputed trial testimony concerning the alleged "adverse secondary effects" of Jake's Bar, with respect to property values and crime, plainly indicating that Jake's had not caused any adverse secondary effects since its opening in 1992. A copy of the pertinent portion of that position paper provided to the members of the Coates City Council is attached hereto as Exhibit A.

5. Your affiant and his paralegal assistant Patricia M. DaCunha, also researched the legislative history of current Minn. State. Sec. 462.357, Subd. 1c, which prohibits the amortization of non-conforming uses, but contains an exception for "adults-only bookstores, adults-only theaters, or similar adults-only businesses, as defined by ordinance."

6. The legislation in question was originally introduced in the Minnesota House as H.F. 896, a true a correct copy of which is attached hereto as Exhibit B.

7. The Senate version of the bill was introduced as S.F. 854, the original version of which is attached hereto as Exhibit C.

8. The House bill was referred to the Committee on Local Government and Metropolitan affairs, which held a public hearing thereon on March 3, 1999. A true and correct transcript of said hearing is attached hereto as Exhibit D.

9 The bill was subsequently brought to the floor of the State House of Representatives on March 8, 1999.

10. The Senate bill was similarly referred to the Local Government and Metropolitan Affairs Committee of

the Senate, which held a public hearing thereon on March 8, 1999. A true and correct copy of a transcription of said hearing is attached hereto as Exhibit E.

11. The Senate version of the bill by the full senate was considered on April 8, 1999. A true and correct copy of the proceedings thereon taken from the Journal of the Minnesota Senate is attached hereto as Exhibit F.

12. Your affiant also represented the Plaintiffs in *East of the River Enterprises III v. City of Hudson*, St. Croix County Circuit Court File No. 99-CV-211.

13. A true and correct copy of the testimony of Dr. Judith Hanna in those proceedings is attached hereto as Exhibit G.

14. A true and correct copy of the testimony of Paul Bern in those proceedings is attached hereto as Exhibit H.

15. Your affiant executes this affidavit in support of the attached motion for temporary injunction and temporary restraining order.

/s/ Randall D.B. Tigue
Randall D.B. Tigue

Subscribed and sworn to before
me this 3rd day of January, 2000.

/s/ Michelle Hreha
Notary Pubic

[SEAL] MICHELLE A. HREHA
NOTARY PUBLIC – MINNESOTA
HENNEPIN COUNTY
My Commission Expires Jan. 31, 2000

Exhibit A

CITY OF COATES, MINNESOTA
CONTEMPLATED AMENDMENT TO THE ADULT USE ZONING REGULATIONS
POSITION STATEMENT
PREPARED FOR JAKE'S, LTD., INC.

©McLaughlin Consulting Services, Inc., 1998

Indian Rocks Beach, Florida
(813) 595-7634
C:\Atwork\TIGUE\
COATES\9643R6 PS
August 1, 1998
Printed January 3, 2000
©McLaughlin Consulting
Services, Inc., 1998

R. Bruce McLaughlin
Member, American
Institute
Of Certified Planners
Registration # 3051

* * *

ACTUAL EFFECTS

1.1 Introduction:

Adult Uses, such as *Jake's*, offer a form of expression which is protected by the First Amendment to the Constitution of the United States, and by the corresponding provisions of the Constitution of the State of Minnesota. In the early 1970s, the City of Detroit perpetrated a fraud on the Courts and on the people of the United States when it alleged that Adult Uses (sexually oriented businesses) have "adverse secondary effects" that are unique and that distinctly different from the effects of any generic commercial land use.

These alleged adverse secondary effects are lower property values, higher demands for police service, and other factors

of urban blight. Subsequently, a number of jurisdictions prepared "studies" to support Detroit's contention. These studies range from employing inappropriate methodologies to being outright dishonest.

This Chapter of the Position Statement will review the actual impacts of *Jake's* on the factors which are allegedly impacted by an adult use.

1.2 Study Areas:

To determine in effect, if any, of *Jake's* on property values and on demands for police service, in keeping with the requirements for such analyses, a control area was selected. Because U.S. Highway 52 is a 4-lane divided and controlled access highway, with service roads through most of the City, it serves as a barrier or buffer between land uses on one side of the highway and those on the other.[1] Accordingly, the subject and control areas were limited to one side of the highway each.

Since the control use and area were also in the City of Coates, and since the City is so small, there were clearly no demographic differences between the areas. The areas were also carefully checked in the field to determine if other existing land uses, (such as "lovers' lanes," derelict buildings, or physical features,) might become confounding variables and affect the results. No such land uses were found. Accordingly, property values were analyzed for

[1] See, *e.g.*, the numerous Zoning Ordinances (including Adult Use Zoning Ordinance,) that establish a controlled access highway as a buffer for variance purposes.

Jake's and each property contiguous to it to the North, West and South.

The control use selected was the *House of Coates*, a bar and restaurant located on the East side of U.S. 52, towards the South end of the City. The *House of Coates*, like *Jake's*, is a place of assembly, where persons gather for food and beverages. It is smaller in size and capacity than *Jake's* and it is on the outskirts of the City, rather than in the "core" of the City. Like *Jake's*, the *House of Coates* backs on fields, and has a single family detached dwelling to one side. Further, diagonally across the Highway from *Jake's* (and thus outside the area of influence of the adult cabaret,) is a convenience store with package sales of alcoholic beverages – two notorious crime magnets.

Accordingly, any unavoidable bias in geographic comparison would indicate that the *House of Coates* is in the location, and of a size less likely to be problematic.

1.3 Property Values:

Property values were analyzed for the potential areas of impact for *Jake's* and for the *House of Coates* for the four year period ending with the 1996 assessment.[2] Both businesses existed throughout the period, and other land uses also seemed to be unchanged through the period.

---

[2] The base for taxes to be paid in 1997 Source Dakota County Assessor, Hastings, MN, December, 1996; analysis, McLaughlin Consulting Services, Inc. December, 1996.

The analysis of property values showed the property values for *Jake's* and for the properties to the North, West and South, increased 34.83% over the four year period.

In contrast, property values for *House of Coates* and the properties to the North, East and South increased only 11.61% over the same period. Therefore, using local empirical data, controlled for potentially confounding variables, there is no indication whatsoever of any "adverse secondary effect" from *Jake's* on property values.

1.4 Calls for Police Service:

Data on calls for police services were obtained from the Dakota County Sheriff's Office.[3] Data were obtained for the "areas of influence" described in section 1.2, above.

For the most part, there were no calls for service except at the two businesses being studied, and at *Coates Corner*, the convenience store kitty-corner to *Jake's*.

In the time period studied, there were approximately 19 calls for police service at *Jake's*, of which approximately 14 resulted in police reports. Several of the calls were for either unlocked vehicles or unlocked premises. Also, a significant number of the calls were for parking violations, the result of the apparently selective imposition of parking requirements. Further, several calls were traffic-related, which were initiated on the highway. Also, the club called for assistance on several occasions, usually dealing with snowmobiles illegally parked.

---

[3] Dakota County Sheriff's Office, 1996 Calls for Police Service, Hastings, MN, 1997.

There were a number of disturbance/fight calls, but, for the most part, the calls were unrelated to the nature of the business. There were no calls related to sex crimes or narcotics.

At the *House of Coates*, there were approximately 13 calls for police service, of which nine resulted in police, reports. Most of the calls at the *House of Coates* related to motor vehicle thefts. There were no disturbance reports.

While the above data show that *Jake's* has a higher demand for police service than did the *House of Coates*, when the more serious incidents (those resulting in police reports,) are taken into consideration, and when the smaller size of the *House of Coates* is also taken into consideration, the demands are roughly equal. Further, it should be noted that many of the calls at *Jake's* related to the selectively imposed parking restrictions, traffic offenses originating on the highway, or management requesting police service.

Therefore, there is no evidence that *Jake's* has an inordinate demand for police services.

1.5 Blight Designations:

No blight designations have been made in the City of Coates.

1.6 Conclusions:

Local, empirical data, properly controlled for confounding variables, clearly indicate that Jake's does not cause adverse secondary effects.

* * *

— Exhibit A —

[LOGO] Minnesota House of Representatives

KEY: ~~stricken~~ – old language to be removed
underscored – new language to be added

NOTE: If you cannot see any difference in the key above, you need to change the display of stricken and/or underscored language.

Authors and Status ■ List versions

H.F. No. 896, 1st Engrossment: 81st Legislative Session (1999-2000) Posted on 3/9/99

A bill for an act relating to land use; precluding the termination of lawful land uses by amortization; authorizing the enforcement of a particular ordinance relating to amortization; amending Minnesota Statutes 1998, section 394.21, by adding a subdivision; and 462.357, by adding a subdivision.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 1998, section 394.21, is amended by adding a subdivision to read:

Subd. 1a. [AMORTIZATION PROHIBITED.] A county, regardless of population, under this chapter or under a special or local law, must not enact, amend, or enforce an ordinance providing for the elimination or termination of a use by amortization which use was lawful at the time of its inception.

Sec. 2. Minnesota Statutes 1998, section 462.357, is amended by adding a subdivision to read:

Subd. 1c. [AMORTIZATION PROHIBITED.] A municipality must not enact, amend, or enforce an ordinance providing for the elimination or termination of a use by amortization which use was lawful at the time of its inception.

Sec. 3. [CITY OF ST. LOUIS PARK.]

Notwithstanding section 2, the city of St. Louis Park may enforce ordinance number 14:7-4.1 (1995), adopted by the city on October 2, 1995, relating to the amortization of a nonconforming ready-mix facility.

Sec. 4. [EFFECTIVE DATE.]

Section 1 and 2 are effective the day after their final enactment. Section 3 is effective the day after its final enactment without local approval, as provided in Minnesota Statutes, section 645.023.

— Exhibit B —

[LOGO] Minnesota Senate

KEY: ~~stricken~~ – old language to be removed
underscored – new language to be added

NOTE: If you cannot see any difference in the key above, you need to change the display of stricken and/or underscored language.

Authors and Status ■ List versions

S.F. No. 854, as introduced: 81st Legislative Session (1999-2000) Posted on 2/17/99

A bill for an act relating to land use; precluding the termination of lawful land uses by amortization; amending Minnesota Statutes 1998, sections 394.21, by adding a subdivision; and 462.357, by adding a subdivision.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 1998, section 394.21, is amended by adding a subdivision to read:

Subd. 1a. [AMORTIZATION PROHIBITED.] *A* county, regardless of population, under this chapter or under a special or local law, must not enact amend, or enforce an ordinance providing for the elimination or termination of a use by amortization which use was lawful at the time of its inception.

Sec. 2. Minnesota Statutes 1998, section 462.357, is amended by adding a subdivision to read:

Subd. 1c. [AMORTIZATION PROHIBITED.] *A* municipality must not enact, amend, or enforce an ordinance providing for the elimination or termination of a use by amortization which use was lawful at the time of its inception.

Sec. 3. [EFFECTIVE DATE.]

Sections 1 and 2 are effective the day after their final enactment.

– Exhibit C –

TRANSCRIPTION OF CASSETTE TAPE LABELED

"LOCAL GOVERNMENT & METRO AFFAIRS

3-3-99 TAPE 2, 1/2"

HOUSE FILE NO. 896

NOTES

[2] Page Line

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[3] INDEX

PAGE

House File No. 896..... 4

[4] (Continuation of Side 1 of cassette labeled, "Local Government & Metro Affairs, 3-3-99 Tape 2, 1/2.")

MR. CHAIR: Members and audience, if you want to lead your conversations to the hallway, I would appreciate that.

We have House File 896 on the agenda next. Representative Larsen.

REPRESENTATIVE LARSEN: Thank you very much, Mr. Chair, and I always think it's great for us to sit on the other side of the table here and see how you guys look. You know, you look pretty good.

MR. CHAIR: Do you want to move your bill? Is it going –

REPRESENTATIVE LARSEN: I would like to move my bill and let it go to the floor. And I do have an amendment, Mr. Chair, to put it into the order that I would prefer for it to be in and that is Amendment H896A1.

MR. CHAIR: We have Amendment H896A1 before us with the bill in the form the author would make it. Is there any discussion regarding that amendment?

Hearing none, all those in favor signify by saying aye.

UNIDENTIFIED SPEAKERS: Aye.

[5] MR. CHAIR: All those opposed nay.

(No response.)

MR. CHAIR: Motion carried.

REPRESENTATIVE LARSEN: Thank you very much. Thank you.

House File 896 is in front of you, and I've given a tremendous amount of thought as to what I would say here this afternoon – or this evening. Having been a former mayor and a city council person, I understand extremely well how local government feels and works, and I also know the power a local government can have and how it affects people's lives. It's a little bit closer to the people than we are here, and it also can touch their lives a little bit closer than what we do with some things here. Not all, but some.

Mr. Coyle came to me and said there had been a court decision that now allowed cities that if they didn't like a business or an entity in their community, they can amortize them out without giving them any compensation whatsoever.

I have a couple handouts. One of the handouts I have will show you all the different ways local governments can get rid of businesses that they don't really care to have in their community with compensation. If one of the pages would pass these out, please. Do you [6] want to give me one? I need one.

Some of these ways are conditional use permits, amended comprehensive plan and zoning classifications, eminent domain, purchase of the property at full market value, standards and regulations by not allowing the uses.

Local units of government have tremendous tools at their fingertips to make sure that they keep their communities in the shape that their citizens want it to be. I feel that with the court decision that this took what would be fair government one step out of that box.

My first reaction to it was, and maybe from a small local government, but I think in large cities too, if you get a council that would decide that they did not like Joe's Pizza Parlor and they got on the council and they talked to other council members and they said, we're going to amortize them right out of the city because I don't like Joe. So all of a sudden Joe's Pizza Parlor is gone, with no compensation whatsoever.

I personal [sic] think that that is not the American way to do things. I don't think that it's fair. Many of us campaigned on keeping government in check, making sure

that we represent the people that elected us, and listening to the people that elected us. Many of the people that would be put out of business are people that [7] we are supposed to listen to. Now, granted, you may not have this happen in very many cases and you may also be able to use this for some very good reasons. My argument to that would be you do have many, many options of doing the exact same thing without a takings. This is a process of taking without compensation.

I also have a stack here – I'm going to pass the stack around because I really hate wasting all this paper. It is a stack of just the letters I received in the last two days of people who support this bill. If one of the pages would just take the stack around because I just couldn't justify making all these copies.

Also, I have a list – do you have the list. I have a list of all of the organizations and companies that support this. I don't know if we have another page. Thank you.

Just a few: Minnesota Trucking Association, National Federation of Industry Business, Northwest Agri-Dealers Association, Minnesota Petroleum Marks Association, Associated Builders and Contractors, Cargill, Stone Mountain Carpet Mill Outlet, Trout Air, A World of Fish, Grandview Lodge, Broadway Pizza in Richfield, New Brighton Amico, Brown County Agriculture Society, Carver General Repair, Minnesota Service Stations Association, and there are also individuals on [8] this list. And this is just a partial list.

I truly believe that if we step back from the politics that we face here every day and we look at a fair policy that you will be able to support this bill.

I will stand for questions, but I do have a few testifiers, Mr. Chair.

MR. COYLE: Mr. Chairman, good afternoon. My name is Peter Coyle. I'm an attorney with the Larkin Hoffman law firm and our firm is working with others on the coalition against amortization. Members of the coalition have been identified in the handout that Representative Larsen has circulated to you today.

We are here to testify in support of House File 896. House File 896 seeks to overturn a very recent court decision by making it clear that if a city or county wants to force the closure of a lawful business in their community they must pay the owner just compensation for that forced closure.

In the Apple Valley Ready-Mix case versus St. Louis Park, the Minnesota Court of Appeals approved the city's use of amortization to force the closure of a lawful, nonconforming business, a long-standing business which had been in that community for at least 25 years.

As of two weeks ago, that business was forced to cease operations as a ready-mix concrete plant. The [9] owner of that business received no compensation from the city, the employees received no assistance with respect to any dislocation caused by the closure, and the business was not entitled to relocate within the community.

If the condemnation process authorized by statute had been used to force the closure of that business, relocation would have been available for the operator, assistance in compensating the owner for the loss of that business

would have been required, and the Apple Valley Ready-Mix decision and this legislation would not be before you today.

The City of St. Louis Park, for its own reasons, didn't take that path. We're not here to revisit that decision. The court of appeals has rendered the decision. We're now looking forward. We want to make sure that going forward there are no other St. Louis Park type decisions where a lawful business owner loses their business investment, their employees lose their job because a city or a county decides that their business is no longer welcome in the community.

The legislation is very simple. If a local government wants to force the closure of a lawful business it must compensate the owner of the business and, for us, it's a matter of simple fairness.

[10] Amortization, as the court decision found, is not compensation because essentially what amortization says is the longer you've been in business, the better off you've done, that's enough. If you sell your house, if you sell a business, people recognize the going concern value of the asset that you've developed in the marketplace and it's that value that we think that a business owner is justly entitled to be compensated for when a legislative body like a city council or a county board decides that that business is no longer welcome in the community.

The legislation does not alter a local government's ability to use condemnation to acquire property, it doesn't affect their ability to use tax increment to help finance the acquisition of property, nor does it alter their ability to use public nuisance laws to eliminate offensive, not necessarily

criminal, but offensive uses in the community that do not meet their standards.

Amortization is unfair to the business owner and the employees of that company may lose financial investments in their assets, skills development of the key employees who may not be able to relocate to another job are lost, future business potential of that company and the well-being of the community in which they operate is jeopardized and the civic involvement of the company and [11] their employees may well be lost if the company is forced to roll up or move to another state or another locale.

We need action on this legislation this year, I would say respectfully, because cities and counties in the metropolitan area, in particular, are in the middle of revising their comprehensive plans and by statute are then required to amend their zoning ordinances to conform to their comprehensive plans.

Business owners may not know that the comprehensive plans of their cities are guiding them for a nonconforming use because the cities and the counties are not required to give individual property owners notice of a potential change when they act on a citywide basis. Likewise, if a city seeks to amend its zoning ordinance on a citywide basis by adopting a new zoning map the property owner does not get individualized notice unless the city chooses to in a particular case. So it's not unreasonable to assume that there are property owners across the state today in your districts who have a comprehensive plan amendment or a zoning amendment that a city is pursuing that could put them into the category of the Apple Valley Ready-Mix kind of case.

We want to make sure that that situation is not repeated and this legislation will keep that from happening. The issue is one of fairness to business [12] owners and their employees. If the public wants to utilize a particular use of property for some future redevelopment opportunity fairness dictates that they pay for the use of that property.

A lawful nonconforming use historically has allowed the owner to continue to operate the business into the future, to sell the business if they choose to sell it, so long as they don't expand the use or alter the type of use made of the property. And we are not seeking to change that standard.

We think that amortization is the wrong way to go, we regret that the court of appeals made the decision it made and we think that the right way to go, and that's why this bill is before you today, is to make it clear to counties and cities that amortization is not – is not an acceptable way to force change in your community. If you want to take a piece of property, the right way to do is is [sic] to buy it from that property owner through negotiation or to condemn it outright and let that process dictate what fair market value is.

Mr. Chairman, there are a number of property owners here who would like to testify on this issue if they could, but we'll follow your lead in terms of what you'd like us to do next.

MR. CHAIR: Mr. Coyle and Representative [13] Larsen, I guess I would like to hear from you testifiers, maybe if you could bring them all down at once –

MR. COYLE: Sure. I'd be happy to do that.

MR. CHAIR: – and then we'll have questions after that.

UNIDENTIFIED SPEAKER: Mr. Chairman, just a point of clarification, HOUSE Bill 896 says amended by the A1 amendment.

MR. CHAIR: That is correct.

UNIDENTIFIED SPEAKER: And the DE1 Amendment we haven't dealt with yet.

MR. CHAIR: No.

UNIDENTIFIED SPEAKER: Okay. Thank you.

MR. YOUNG: Mr. Chair, committee members, my name is John Young.

In 1988, my wife and I decided to become landlords. We sold our home in Minneapolis, took all our savings and including our – all the equity we had in our home and we built an office warehouse in the City of Eagan in an industrial park. We moved into a rental property and in far less convenient living conditions than we had in the past. Neither one of the us were employed because we put our full efforts into this.

In 1994, I was faced with this situation along with [14] eleven property owners and a complete industrial park in the City of Eagan. This is a site plan of that industrial park and this was the building that we owned, that we had put our life savings in. To us, this building was like perhaps your retirement income account. Like if you have mutual funds or stock, I don't own any mutual funds or stock. My money has been invested in real estate.

The City of Eagan changed their ordinance and on a nonconforming use that said they could deem a property be obsolete and exhausted in time. This building was five years old at the time. I had not changed the first set of fluorescent light bulbs in that building and now the city was ready to deem it obsolete and exhausted.

The building next to me was six years old. The building next to that was less than two years old. There was no building in this industrial park of over 40,000 square feet and many small businesses had their whole life savings tied up. That was now threatened with an amortization issue in this community.

The city council didn't really understand the amortization process and it had gotten – it had gotten started with a new community development director as a suggestion and it was in the – at the planning commission stages. This created such a political [15] nightmare of public relations for the City of Eagan that they hired a public relations department and still have that department hired today.

I currently serve on the City of Eagan's Economic Development Commission. I think I was either – put on either by a four-to-one or a five-to-zero vote and we started a business association and half of our members are on their [sic] per an economic development situation.

But the scars it's created and the wounds that this took to heal was tremendous for the City of Eagan. They went out and did listening sessions, and I can't tell you all the things they did and today there's an excellent process, excellent communications in the City of Eagan. The city council did not understand what they were getting into with this amortization.

Also, the community development director said that once we're done with this area, we're going down along Highway 13 and there's some more buildings over there. There were also people in the community that the reversal was that they were in industrial areas or areas that the city wanted to be suggested industrial and they were being put into the nonconforming process of their house to be eliminated in time.

And I can tell you the day after the community development director resigned, a lady called me on the [16] phone and she lived in a subdivision of 110 homes across from Knox Lumber in Eagan and said – and was in tears saying, I don't know if I should even wallpaper my home, my kitchen.

I called the city administrator, Tom Hedges, and told him of this lady in tears. They immediately got this on the agenda and got their nonconforming use status changed because the city kind of walked into this – because they didn't realize what happened with the Chapter 176 change, but now the comprehensive guide plan control and they had put that area that was in an industrial park of homes, there was one spec, but it was 110 homes into the comprehensive guide thinking some day that should go industrial. Not thinking through the whole process. But then, when they started changing their ordinances to tie it together to the amortization, it literally turned into a fearful, very scary situation for those homeowners.

And I know I met with the mayor and city administrator, Tom Hedges, and the mayor said, well, many of those people are members of my church. I certainly wouldn't consider that – that situation of those homeowners and they corrected that situation.

And I don't own this property today. We have a new street and we don't have any issues of amortization. We [17] have a great working relationship with the City of Eagan, but it just created a very difficult situation for the city council and the staff. Many staff members quit and resigned, city council members didn't get re-elected and three of the city current council members that on the current Eagan City Council have been up to the state legislature trying to reverse Chapter 176.

MR. CHAIR: Okay. Mr. Young. Who is next?

MR. VALE: Mr. Chair and Representatives, my name is Leroy Vale. I operate a service station in Bloomington on the corner of 90th and Lyndale, in Ann's community there. I've been there since 1966.

I purchased the real estate from Shell in 1980, put my life savings into that operation. I've worked very, very hard to keep it neat, clean and tidy, well painted, well lit, do everything I can to keep it a going operation.

We're still a full-service station where we can actually put air in you kid's bicycles and tires and help put a fan belt on your mother-in-law's car on Sunday, which is pretty hard to find nowadays.

Recently – last May, as a matter of fact, I got a letter from the City of Bloomington where I would have to remove my propane tank off of the corner. It was a nonconforming use. They don't want it there anymore. I [18] did go through and get my permit and everything when I put it in about five years ago and now they say it should be gone.

The first year my business was pretty good at it. The year after that, it's nothing but doubled about every year. I

have a real good business for propane going. Now, all of a sudden, the city wants to take that away. I would have no problem with that if they had a use for the land and they were going to take it and do something with it or purchase the property from me and do something, but to take away my livelihood and still leave me there, it looks like they're trying to strangle me versus let me have an opportunity to make a living.

They had – we had the planning commission out – or the planning people come out from the city and the city fire marshal was out and the first question I asked the fire marshal was what was wrong with where the tank was at the present time. He told me it's the place that it should be. It's out on the corner, it gets air flow around it, very well protected. He told me it was one of the better protected installations he'd seen. He said the only reason I'm here is because the city wants it moved. But, to me, that's where it belongs.

The next thing I did is I got ahold of weights and measures that comes out and checks the tanks and [19] everything from the state here. The lady that came out and checked everything said that's one of the nicest installations she's ever seen. It was done very, very well. It's neat, clean, tidy, protected very good. Well, I can't understand, they think I gotta move it. So it would be okay to sell propane, but I gotta have the tank moved because they don't like it where it's at. So they amortized it off. So I have until May 1st, 1999, here to move it.

Now, I checked on having a tank put in underground. It would cost $79,800 some dollars. Which is not a real problem, you know, but $80,000 is a lot of money, you

know, in my book, you know. Maybe you guys can whip up $80,000, but what I do is fill people's propane grills and the local businesses fill their forklift tanks and stuff there and I sell fuel to the City of Bloomington, I sell propane to Richfield schools, Bloomington schools, all of the stores in the community and it's been a good situation. I can't understand how I can have a business and all of a sudden they can take it away from me.

Now, again, they can take it away for free. Just walk away with it. I don't understand that. So I know what some of the problems are down the road. I know that some day they'd like to put a right turn lane in on my corner on the intersection but, to me, they should have [20] to buy the property like I did. I don't know how they can just shut me down and make me to where I can't generate a profit, then they can get it for free. I've seen that happen. This totally isn't right.

It wouldn't be any different than as if we took your home and said, well, you know, it's been there ten years, I think it's used up, let's tear it done [sic]. I don't know how many of you people can afford that, but I can't, you know, and I employee 12 people. We work real hard and we do a great job and, I mean, I followed the American dream and did what I thought was right. I can't understand this. I would have to say that I gotta support this. This isn't right. This would be legalized theft. So, to me, I have to support this.

MR. CHAIR: Thank you, Mr. Vale.

MR. VALE: It's gotta be stopped.

MR. CHAIR: Who's next?

MR. ELZHOLES (phonetic): Mr. Chairman, thank you for the opportunity to come before the committee to express my opinion on this legislation. My name is Bill Elzholes. I'm the owner of Overnight Express, a trucking company.

Now, trucking companies have been notorious for having been wanted to be relocated because trucks are kind of unsightly and, you know, they kind of get in the [21] way and so forth, but it's kind of fortunate that they're around because we wouldn't be having this meeting if it wasn't for trucks. There would be no lights, there would be no building, there would be no paper for you to write your memos on. Everything came by a truck so trucking is fairly important. It's very important to me because I've been in the business for over 30 years – I guess over 40 years and I've kind of lived with it all my life. It's been my life.

Now, what happens when you go into the trucking business and you buy a building and you set up your operation and 25 years later you've amortized that building off and somebody comes and says, oh, by the way, we're going to take that building and you're going to be left with the land. Well, that's fine, but why don't you pay me.

On the other hand, it isn't so fine even if they take the building and pay me because location is a very important thing in the trucking business.

You take the LTL business which – take a company here in town that maybe has 50 city pickup trucks. Those are the small semi-trailers that run around town and pick up and deliver the freight to the various shops, warehouses, and manufacturing plants and so forth. They bring those trailers back to the terminals. The freight [22] is

offloaded on there and they may have freight with destinations going to numerous places throughout the country. Therefore, they sort it, put it on the line haul trailers that are going to those destinations and the process continues at the other end to deliver the freight.

Now, what happens if you're located not in the center of the city. The midway area used to be the center of the trucking industry in Minneapolis/St. Paul. Today it is not, but the reason it isn't is not because of a bad location but because there was not enough land area for the trucking companies to expand. Well, that midway location is very prime because no matter which direction you go you are headed in a direction of a customer. Now, say you move 4 miles out and you have 50 pickup trucks that run daily. It takes about 15 minutes for it to run that 4 miles further. Take that at $35 an hour, 50 trucks, two trips a day back and forth, that comes to a figure of approximately $227,000 per year because you are 4 miles different location than you would have been if you were 4 miles closer to the center of the community.

That's why it's very important that the trucking industry not only is concerned about the fact that their property is going to be taken and they're not going to be [23] reimbursed, but the relocation is going to put them in a position where they probably will not be able to make the money necessary to stay in business and therefore the same thing will happen. The employees will be out of a job, the owners will be out of a lot of money because they had a building that they were counting on for retirement use to sell it and then use that as their retirement and so consequently everybody is going to suffer.

And for that particular reason did the many others that he – or wherever he went – that he came up with – propane, we would go to his station to pick up propane because we need propane to run the heater units on our semi-trailers to keep the freight from freezing at this time of the year. So it's all interconnected in that reference and for that particular reason I'm very much in favor of this bill being passed.

MR. CHAIR: Thank you, sir.

MR. ELZHOLES: Thank you for the opportunity.

MR. CHAIR: And Representative Larsen, we're trying to give equal time to the other side. I think you've used up 25 minutes. I know you're on a tight schedule so –

REPRESENTATIVE LARSEN: We're just about done, Mr. Chair.

[24] MR. CHAIR: – If the other testifiers could be brief, we'd appreciate that.

MR. ANFANG (phonetic): Mr. Chairman, I will make it very brief. My name is Dick Anfang. I'm the executive secretary of the St. Paul Building & Construction Trades Council and the vice president of the AFL-CIO.

One of the first things that I thought of and I was asked is just exactly why is this a labor issue. And I had to stop and think about it for a long time and the more I learned about it the clearer and clearer it became that it certainly is a labor issue.

It's also a very – it's also – the thing that makes it a labor issue, I think, is one of the principal philosophies of

the labor movement is fairness. The unfair amortization of property, taking it away from a homeowner or a business person with remuneration, I believe is unfair.

I believe to allow the taking of private property, be it my business or my home, without due process, consideration of public necessity and remuneration for such taking – remunerations for such taking is inherently wrong, un-American and unfair. Unfair not only to the security needs of the businesses that are affected, but to the security needs of the employees, [25] whether they're union or not. That is a very important aspect of the world of work and that is you job security. This would put – this type of activity, if proliferated would put that in serious jeopardy.

Trucking companies, sod farms, excavation companies, car lots, scrap yards, farms, any industrial employer who has over time been surrounded by ever growing cities could fall victim to unfair amortization as the court has deemed to be legal.

Local units of government have at their disposal and often use and by and large accepted processes for which taking of private lands or businesses can be accomplished.

I encourage you to support this legislation and to not only – and to not allow the proliferation of amortization to take private property of any kind. Amortization is not the best or wisest method to determine land use and should be prohibited. Thank you.

MR. CHAIR: Thank you.

Do you have a question?

UNIDENTIFIED SPEAKER: Well, just a comment. I was getting a queasy feeling when I see you

sitting at the same table as Hickey (phonetic) and supporting the same bill.

UNIDENTIFIED SPEAKER: I'm sorry.

[26] UNIDENTIFIED SPEAKER: It's just for a coalition.

UNIDENTIFIED SPEAKER: Well, that was just my comment then.

MR. CHAIR: I appreciate your comment, Representative Rukevina.

UNIDENTIFIED SPEAKER: Lands rights and labor at the same time. What a hoke.

UNIDENTIFIED SPEAKER: Something's not – something's not right with this picture.

MR. HICKEY: Mr. Chairman, I'm Mike Hickey from the National Federation of Independent Business, and it's a unique pleasure to be able to sit at the table with organized labor on an issue after all the years of haggling over workers' comp. I know you're all having a very tough day at the Minnesota legislature so I'm going to make just a couple of very brief comments.

First of all, we're here to give strong support to this measure today. We want to thank Representative Larsen for stepping forward and offering this. I'm no expert in municipal law, but I do hang around law circles and, frankly, I was shocked when I heard about this court case and the fact that St. Louis Park, apparently, is going to get away with what they did to that business owner out in that area.

[27] And, obviously, eminent domain or condemnation is not a popular, joyful process, but people do get just compensation or at least some kind of compensation. And for a city to run rough shod over a business owner that's contributed to the community, that's put sweat equity into the business and get away with this is very concerning and that's why we feel this is a very high priority of ours this year to get Representative Larsen's bill passed.

When you look at the St. Louis Park case, what is this owner going to do. Turn a ready-mix plant into a luxury hotel, into a shopping mall. I mean, this guy is sitting there with a ready-mix plant that could basically do about one thing, and he has his hands tied and he's still stuck with the property. And I guess that is just the shocking thing about it and that they could get away with this.

We strongly urge your support of this legislation.

MR. CHAIR: Thank you, Mr. Hickey. And we have one more.

MR. HOUCK (phonetic): My name is Tom Houck, and I'm in a family that owns several small businesses. I'm a partner with my dad and brother in a business that provides contracts with transit systems to provide their advertising service. My wife, Terry, owns a day care [28] center in Hugo, and my sister Ann owns a clothing store in Roseville.

I'm here today because I feel very strongly about this issue. One of the most sacred rights we have in this country is the ability and the right to own property without worrying that the government is going to take it from you. And this process called amortization is just that. It is

not compensation. It is delayed confiscation. And I would respectfully request that this committee approve this bill and move it forward to the floor.

MR. CHAIR: Thank you, sir.

Representative Larsen, I don't know if you have any comments, but we will let opposition from the audience speak to your –

REPRESENTATIVE LARSEN: Mr. Chair, I know there is opposition to the bill. The League of Minnesota Cities has opposition, and I would invite them to the table at this point in time, but I would like to have a few minutes at the end to wrap up after questions. Thank you.

MR. CHAIR: And we'll allow you that and we'll allow for some questions too.

Is there someone from the league that wanted to testify?

[29] UNIDENTIFIED SPEAKER: Mr. Chairman, one quick comment. I want to make it clear that we regard the Apple Valley Ready-Mix decision as having been made. We accept the conclusion of that case. We're looking forward now and trying to prevent something like this in the future.

MR. CHAIR: Understood Mr. (inaudible).

UNIDENTIFIED SPEAKER: Thank you very much.

MR. BROOKER: Mr. Chairman, I'm not from the League of Minnesota Cities. I am the chair of the public law section of the Minnesota State Bar Association. And I would like to speak in opposition to this bill as drafted.

MR. CHAIR: If you could state your name for the record.

MR. BROOKER: Yes. Greg Brooker, B-r-o-o-k-e-r, chair of the public law section of the Minnesota State Bar Association.

MR. CHAIR: Go ahead, Mr. Brooker.

MR. BROOKER: Thank you. This bill overrules 30 years of case law in Minnesota. We are not talking about a case within one year ago. We are talking about a 1968 Minnesota Supreme court case, a well-reasoned, well-thought-out opinion that allowed for the first time amortization to take place in Minnesota. We have come 31 [30] years to this point. The sky has not fallen in.

The vast majority of townships, counties, cities have used amortization sparingly, very, very reasonably and that's why the opposition can cite you one, one case from the Minnesota Court of Appeals in 1998, one case.

Now, if you are in favor of sexually-oriented businesses and saunas that front for prostitution, you should vote in favor of this bill. And I'll tell you why.

UNIDENTIFIED SPEAKER: Mr. chair, I hate to interrupt this witness, but I take great offense to that.

MR. BROOKER: I take great offense for being interrupted. If I may continue to make my argument here.

There are important tools that government uses to move a sexually oriented business –

(End of side 1 of cassette labeled, "Local Government and Metro Affairs, 3-3-99, Tape 2, 1/2 ")

(Beginning of Side 2 of cassette labeled, "Local Government and Metro Affairs, 3-3-99, Tape 2, 1/2.")

MR. BROOKER: – out of one zoning district into another. And let me tell you the scenario.

Sexually-oriented businesses move into townships, counties, and cities that have not – no zoning for that [31] particular use so they are deemed a legal, nonconforming use the minute they step in when there is no zoning that particularly applies to them. They would receive the benefit of this bill and let me walk you through it.

Let's say a sexually-oriented business moves into a strip mall near a church, near a day care center, near a school and they have happened and this has happened in the state of Minnesota previously. What will happen then is the city – once the phone rings, the city council or the township board will enact a zoning ordinance that applies to that particular use, the sexually-oriented business. They will then amortize that business and it will allow that business to remain five or six or ten years, depending on the amount that's reasonable under the court cases, and then move them into the new zoning district that has a buffer from child care centers, that has a buffer from churches, that has a buffer from schools.

Now, the tools that have been listed by the proponents of this bill do not do precisely what I just laid out. They do not give the cities, the counties, the townships the power to move that use to another zoning district. Now, the nuisance ordinances are helpful, they are, but they're very difficult to prove, and an adult book store has first amendment rights under the case law [32] and so they are

not perceived to be, per se, nuisance. So the nuisance ordinance may not be helpful.

Now, the condemnation and eminent domain statute is also not helpful in this case because in many cases the sexually-oriented business, the adult book store, has perhaps a five-year leasehold interest in a building. They typically do not own the building and so the city, in an eminent domain action, seeks to condemn the building or destroy the building for another use. In this case, the goal is not to condemn the physical use. It is to move the leasehold interest into another zoning district that is appropriate for it. And the courts are clear that we cannot ban sexually-oriented businesses from a community and so they have to go somewhere and so the best you can do is to put them and buffer them from sensitive uses such as schools, such as day care centers that are licensed, such as places of worship.

Now, we urge you to understand that this simple one-page bill is reversing 31 years of cases in Minnesota.

My final point is this: There has been a lot of misinformation and amortization – I saw a handout here today here. Amortization is allowed and legal in most states in the United States either through court decisions or through legislation. It is not a new [33] concept. It is not a minority concept. It is available. It is a tool that local governments use and I would argue that those government officials who know amortization law do not use it for – and, in fact, it would be inappropriate to use it for moving a single family dwelling house. No, that's an eminent domain situation clearly. No judge in this state would allow a city or a county or a township not to condemn

a single family dwelling house and pay just compensation and use amortization.

Thank you. And I feel very strongly that this is an important tool to close saunas and sexually-oriented businesses, and I know of no other tool that can get me to where I want to be in moving these businesses into areas that are buffered from very sensitive areas. Thank you.

MR. CHAIR: Mr. Gleason.

REPRESENTATIVE GLEASON: Thank you Mr. Chairman. I just had a question regarding the – you know, where you have a sexually-oriented building or a business in a building on a lease. Is it – isn't it possible to condemn the lessee's interest in the lease as opposed to the whole property or does condemnation only apply to a real estate?

MR. BROOKER: Mr. Chairman, as I understand [34] it, your question is of the leasehold – can you just narrowly condemn the leasehold and, in effect, void the lease and then pay just compensation for whatever leasehold interest they have. I don't know if that has ever been done in the state of Minnesota. Somebody may be able to educate me about that.

The eminent domain process, though, usually talks about the whole entire property pie, and you're condemning property and you're paying just compensation for that property. I think, in many of these cases, it's very difficult because you have the leasehold interest and you have a willing landlord who has rented to this property owner.

You'd have to go through the analysis of the public purpose to condemn and then, in effect, force the landlord to change the use of the property that they agree to by

private contract law. I think that would be a very complicated eminent domain case.

MR. CHAIR: Thank you.

REPRESENTATIVE REUTER: Mr. Chairman.

MR. CHAIR: Yes, Mr. Reuter – Representative Reuter.

REPRESENTATIVE REUTER: Thank you, Mr. Chairman.

Mr. Brooker, do cities have the option, in advance [35] before these sexually-oriented businesses come into their city, to zone it so that they – so that they – a business knows where they can and can't go before they come in or can – no matter what kind of zoning the city might have, they can just come in and set up shop anyplace?

MR. BROOKER: Mr. Chairman.

MR. CHAIR: Mr. Brooker.

MR. BROOKER: The answer is, of course, yes. They can be proactive in getting a zoning ordinance in place. However, you must understand that they have very creative lawyers who say, your definition of adult book store isn't what I have. So the zoning ordinance is very difficult to write ahead of time. You must have an adult car wash, an adult book store, an adult – and try to think of about what else could possibly be out there and get a definition that's going to hold up in court.

So the problem is many, many times these businesses come in and they say the zoning ordinance, as written, does not apply to me and therefore you are – and they say I am now a legal, nonconforming use and I now have the

benefit of this bill, if it becomes law, and now you can't amortize me, pay up.

That is my concern. I think there are some detrimental effects to this bill. If you're going to [36] look at amortization, look at a bill that brings some parameters in, that maybe controls some of the abuses that you have heard of today, but in one half a page this bill undoes 31 years of case law on which we have relied to close down, yes, close down, but in most cases move sexually-oriented businesses from an improper zoning district, over time, to a new district.

And the community, although they don't like it, the courts say you can't ban them. They are at least buffered from child care centers, from schools and from churches. This is a national tool that is used all over the country and in Minnesota you will put us 30 years behind if this bill goes through.

REPRESENTATIVE REUTER: Well, Mr. Chairman and –

MR. CHAIR: Representative Reuter.

REPRESENTATIVE REUTER: – Mr. Brooker, I can appreciate what you're saying. I guess in a day when we can't even define the word "is," I can imagine lawyers can argue anything.

But I guess my concern is do you think that if we pass – I mean, we change laws here every day. We go about back and undo. We repeal laws and we pass new laws that supersede old ones all the time here. And they all have their effects. Some argue positive; some argue [37] negative.

But do you think – do you think if we pass this, other than the damage that you say it will cause, do you think if this bill passed that this bill could be found to be unconstitutional?

MR. BROOKER: Mr. Chairman, I'm not a judge, and I suspect the court would look at a reasonable amortization bill as a legislative function and that it would probably – maybe it would pass muster. I don't know. I don't – I haven't prepared to look at whether, in other states, amortization bills such as this one have been struck down by courts. I don't want to go down that road because I'm not – I'm not equipped to do that.

MR. CHAIR: Representative Rukavina.

REPRESENTATIVE RUKAVINA: Well, Mr. Chair and Mr. Brooker, you know, I'm not really concerned about adult book stores or saunas. I've got some finished constituents in the ring. The real pronunciation is saunas, not sauna. But, aside from that, yeah, it's a finished work.

But aside from that, how do you explain what happened to the – to the Ready-Mix company that we hear about?

See, I come from an area – you know, I don't really like this bill merely because of who's supporting it [38] because I've been lied to so many times by some of the people that have come up to support it here, and that's not directed towards Mr. Anfang or the union.

UNIDENTIFIED SPEAKER: Or the chair, I assume.

MR. RUKAVINA: No, nor the chair, but some of the names on this list, and I'm specifically referring to the

workers' comp. bill in '95 when in 1992 they already knew that workers' comp premiums were shooting drastically down.

But, aside from that, I come from an area where eminent domain is used a lot by both the federal government, by the mining companies, and even though I'm not ashamed to say on many issues I'm a good liberal, I'm a red neck on certain land use issues and I'll be very frank about it.

I'm concerned about what happened to that ready-mix company. I'm concerned when people move in and, obviously, this was used in that case. So tell me how you can stop something like that from happening? Why wasn't eminent domain used in that case? Why wasn't that person's land paid for? What's the deal here? I mean, obviously this is being used for a lot of other things besides saunas and adult book stores.

MR. BROOKER: Mr. Chairman, I believe there's [39] other witnesses that can really get into that case so I don't want to. I've read it, but I don't know all the intricate facts and what process the city went through. I can only say this: That amortization is an important tool and if do you have some concerns about the stories you've heard, a more narrow bill may be appropriate where you can give some parameters and set out some rules to the cities, the counties, and the townships that need to use this in appropriate cases. But this bill wipes out any ability – I can't emphasize that enough. And so, in those cases where the phone call rings –

REPRESENTATIVE RUKAVINA: Any ability – Mr. Chairman, excuse me. Any ability, Mr. Brooker, to do what? To stop adult – are we just – is your entire presentation about adult book stores and saunas?

MR. BROOKER: Mr. Chairman –

REPRESENTATIVE RUKAVINA: Because, quite frankly, I don't give a damn if that's what it is.

MR. BROOKER: Mr. Chairman, I used that because I think it's an important tool and it is important to people when it pops up in their neighborhood and the phone rings at the city council or the county board, but I also – my other point of this – my other point is that this is a bill that just does not undo one case from last year. It has a longer history.

[40] REPRESENTATIVE RUKAVINA: And I understand that, sir.

MR. BROOKER: Thank you.

REPRESENTATIVE RUKAVINA: But I am – still, I hope you as a representative of the Minnesota Bar Association, or is it the Trial Lawyers – which were you?

MR. BROOKER: I'm the chair of the public law section of the Minnesota State Bar Association.

REPRESENTATIVE RUKAVINA: The state bar association that you could help me understand – understand what's going on here and how this tool was used because if this tool could have been used for a ready-mix company to shut it down, then it could be used for a mine or – you know, a timber-producing company or something like that.

REPRESENTATIVE ABRAMS: Representative Tuma, on this point.

Representative Rukavina, I think that the important words that he said is from the public law division of the Minnesota State Bar Association. There are various sections of the bar.

MR. BROOKER: That's right.

REPRESENTATIVE ABRAMS: And other sections of the bar, I would suspect, are in favor of this bill. So [41] don't allow confusion that somehow the bar is united against this bill, Representative Rukavina.

REPRESENTATIVE RUKAVINA: And Mr. Chair, Representative Abrams, I understand that, but this gentleman is obviously concerned about the public sector in representing that portion of the bar association that represents cities, counties, schools, etc., right?

MR. BROOKER: That's right.

REPRESENTATIVE RUKAVINA: So, you know, that's all I'm trying to get to the bottom of is how was amortization used in this ready-mix, and why wasn't eminent domain or something else where this owner would have been compensated fairly for their property?

MR. BROOKER: And Mr. Chairman, I'd like to defer to the people who were involved in that case to answer that precise question. So I'll leave.

REPRESENTATIVE RUKAVINA: But not even being precise, Mr. Brooker, could it happen again regardless of this case? Could it shut down a mine? Could it shut down a manufacturing plant?

MR. BROOKER: Mr. Chairman, as I read the 1968 Minnesota Supreme Court case and the more recent Court of Appeals cases, there are very strict hurdles that you have to jump over in order to – in order to justify amortization and to get it upheld in a court of [42] law.

Now, having said that, I don't want to dispute what has earlier been said today. And so my point is if you have a concern about amortization, focus in with the more narrow bill on parameters and rules and public hearings and when and when [sic] you can't use it, but please don't tie the hands of government when it is used in those cases for the public good.

MR. CHAIR: Thank you.

Members, I did say that I would give equal time to both sides and so far Mr. Brooker has used up 20 minutes of the 30 minutes that were available.

MR. BROOKER: I'll leave.

MR. CHAIR: Representative Hasskamp, you had a short question?

REPRESENTATIVE HASSKAMP: I do have a question, Mr. Brooker.

First of all, thank you Representative Abrams for enlightening us that are not lawyers as to what his presence means. Certainly, you know, hearing that he's speaking for the bar, even though it's a committee of the bar or whatever category it is, I'm really glad to know this one aspect of it.

Sir, you know, in this particular world, this is our world, it's not a courtroom, but it's a legislative body, [43]

we often, if we've got problems with bills or if we've got concerns over how far they go, an organization like yours usually has the courtesy to talk to the author of the bill and try to find a way to work out the concerns you raise.

Did you ask for a meeting with the chair of this committee and the author of the bill to try to work out a way to do both, to make sure that there is enough tools to prevent what you're saying [sic] happening, the sexual explicit adult types of business from encroaching on our communities, as well as protect the legitimate communities – or businesses from being literally legally stolen?

I mean, I just want to know that because your credibility as far as coming forth has an impact on me if you didn't at least try to negotiate some kind of amendments or a change of language to accommodate your concerns with the author.

MR. BROOKER: Mr. Chairman, as I understand, there is an amendment that the League of Minnesota Cities was working out. I don't know the status of that and perhaps Gary can testify to that, but that is an amendment that does bring in some parameters, some limitations on the use of amortization by local government and so –

[44] REPRESENTATIVE HASSKAMP: So, Mr. Chairman, Mr. Brooker, you did not attempt to meet with the author, as you representing your bar entity, to try talk about this before today?

MR. BROOKER: Did I personally?

REPRESENTATIVE HASSKAMP: Yes.

MR. BROOKER: Mr. Chairman, no, I did not. And, Mr. Chairman, please I have always used the words public law section of the Minnesota State Bar Association.

MR. CHAIR: No confusion on my part.

MR. BROOKER: I don't want to represent the entire bar. Thank you.

MR. CHAIR: The league, you have about ten more minutes if could you present any other testifiers or if there's any other people too. I understand so far only the league –

UNIDENTIFIED SPEAKER: Mr. Chair, in defense of the opposition, our questions were longer so you've got to subtract those. That's the way us democrats always did it.

MR. CARLSON: Mr. Chair, members of the committee, my name is Gary Carlson. I'm with the League of Minnesota Cities. I'm going to be very brief so that we can let the City of St. Louis Park discuss the actual [45] events surrounding the amortization that is in question here. I think that they can shed a lot of light and information and facts to the case that will help paint the issue of how the city used amortization in that process.

We are opposed at the league to this bill, and we have talked with the author and we did seek an amendment to try to find some common ground. We were unable to at this time find common ground with that amendment.

But let me then turn it over and let the City of St. Louis Park talk about their particular situation, unless there's a question.

REPRESENTATIVE HASSKAMP: I have a question.

MR. CHAIR: Representative Hasskamp.

REPRESENTATIVE HASSKAMP: Mr. Chairman, sir, I know a little more about why this was – this tool was started, but what I've heard the other witnesses – as to how this is being abused, in my view, when you're stealing a particular lifelong business because you don't like where they are now because you're – the idea that the communities that develop a certain area and they don't like this image.

And I'll just tell you up front what when I see a little business that's been literally surrounded by all this other stuff and they're going to lose their business [46] because somebody else covets what they want or they want to change it, I don't have much empathy for the city if they're going to do that to them. I don't have any empathy for them.

But you can give me, besides this – you know, this issue of St. Louis Park is not what I'm more concerned about. I'm talking about these incidences where somebody says, we don't want this tank, we don't like how it looks, we're going to just say get rid of it. I mean, that's what I'm worried about. It's obviously being used by some community because of the witnesses for the bill.

So you can tell me, you know, in the cities – because I'm trying to understand this, why would you want to take somebody's business without compensating them. It's a concept I can't comprehend, especially as supportive of cities I have been, I can't understand why you would do this.

MR. CARLSON: Mr. Chair, Representative Hasskamp, I'll try to be very brief.

First of all, I mean, this has been painted as a taking issue and let me just assure you that, first of all, the property itself is never taken from a property owner under an amortization proceeding. What the intent is, is to take a nonconforming use, a use that does not conform with the city's plan, and phase that out over a [47] period of time allowing the property owner to basically recover their investment in that property.

Examples of how it's used, I think the primary ones have probably already been mentioned. Discussion of how to phase out billboards in, for example, residential neighborhoods is one that we know is probably one of the most commonly used aspect or feature of amortization. Other nonconforming uses such as perhaps a facility, a junkyard, so to speak, in an area that may want to be redeveloped is another technique that may be used.

Those are very simple examples, but the property is never taken from the owner of the property proper like an eminent domain proceeding or a condemnation proceeding. The property owner still retains that property. They must bring the property into a conforming use with the city zoning ordinances.

REPRESENTATIVE REUTER: Mr. Chairman, a real quick question if I may.

MR. CHAIR: Representative Reuter.

REPRESENTATIVE REUTER: Thank you.

Could the City of Bloomington decide that they want the Mega-Mall to be an outdoor sports arena and use this process and shut down the Mega-Mall?

MR. CARLSON: Mr. Chair or Representative Reuter, I cannot speak to that. I am not an attorney. I [48] would like to have perhaps an attorney speak to how far amortization could go.

UNIDENTIFIED SPEAKER: Well, I think that's how far it could go.

REPRESENTATIVE REUTER: Thank you, Mr. Chairman.

MR. CHAIR: Mr. Carlson, I want you to understand that we'll listen to St. Louis Park's situation, but I understand this bill is not relevant to that specific situation. If they want to talk about how amortization is used; in particular, how it relates to how they can get rid of these kind of businesses and how they do that, that's fine, but I don't want to relive the St. Louis Park situation. I don't think that was the intent of the author of this bill. I think they're specifically exempted out. So I'm free to talk – they're free to talk about amortization in general, but I'm going to cut them off if they start talking about why – they're right and somebody's wrong.

REPRESENTATIVE RUKAVINA: Well, Mr. Chair.

MR. CHAIR: Representative Rukavina.

REPRESENTATIVE RUKAVINA: To that point, Mr. Chair, it would shed some light for me as to why they used it in that particular case because that was the question

I had asked of the attorney and he couldn't [49] answer that kind of thing.

MR. CHAIR: That's perfectly fine. I just don't want to start reliving the whole thing because it's not about who's right or wrong in that particular situation.

REPRESENTATIVE RUKAVINA: Mr. Chair, that's correct.

MR. CHAIR: It's about how it was used and how it works.

REPRESENTATIVE RUKAVINA: Right. And I want to know –

MR. CHAIR: And I want to limit it to that.

REPRESENTATIVE RUKAVINA: – why they did not want to use another form like eminent domain or whatever.

MR. CHAIR: Those are perfectly fine.

MR. CARLSON: Mr. Chair, I appreciate that and you're right, we will keep the discussion to that and given the bill's construct, no longer would this process that they will describe be available to your community.

REPRESENTATIVE ABRAMS: Sir, I do have a question for Mr. Carlson.

MR. CHAIR: Representative Abrams.

REPRESENTATIVE ABRAMS: Mr. Chairman, Mr. Carlson, my father was in the scrap recycling business and put me through law school, could you please tell me [50] what's wrong with junk yards?

MR. CARLSON: Mr. Chair, Representative Abrams, I didn't say anything was wrong with junk yards. I was just saying that in an inappropriate locale it may create problems in a community.

MR. CHAIR: Mr. Carlson, do you have some testifiers? If you could try to keep your remarks – I know there's some other folks that need to get our taxes back to us as soon as possible and want to start a conference committee to do that. So if you could keep your remarks to about five to six minutes, we'd really appreciate that.

MR. HARMONING (phonetic): Mr. Chair, members of the committee, my name is Tom Harmoning. I'm the community development director for the City of St. Louis Park. I've asked that a sheet of paper be distributed, which is identical to the board which is to my right which is intended to provide a case history of the Apple Valley Ready-Mix amortization situation.

We were not intending on trying to defend that particular process or debate it with you. We are providing you this case history as an illustration of the lengthy process and the time and consideration that's involved in undertaking amortization and having it hold up to the scrutiny of the courts.

[51] To my left is Tom Scott. He's the city attorney for the City of St. Louis Park who was involved in the amortization case with us.

As is indicated on the board and on your handout, the ready-mix plant was constructed in 1954. So, as you can see, it's been around for quite some time. That particular ready-mix plant is located in western St. Louis Park near Highway 7 and Louisiana Avenue.

In 1959 – or I should back up a moment. In 1954, when that ready-mix plant was constructed, it was constructed predominantly in an industrial area. There was some residential property located to the west of the site but, by and large, it was heavy industrial. In fact, one of the sites next to it was the former Riley Tar site, now a park and also residentially developed, but also a Superfund site. So the area in which this plant was originally constructed was industrial in character.

However, in 1959, there were some concerns regarding the impact that ready-mix plant had on adjacent residential areas and the city council at that time, 40 years ago, amended the zoning ordinance to require that ready-mix plants be located a certain distance from residential areas. That particular ready-mix plant did not comply with that standard and as a result it became [52] nonconforming.

In 1973, the zoning ordinance was amended again after a public process to disallow ready-mix plants and a number of other types of industrial uses in the city. That ordinance disallowed the ready-mix plant and other industrial uses. That was at about the same time that the creosote plant next to Appeal Valley Ready-Mix closed.

In 1974, Apple Valley Ready-Mix bought this plant. They did not construct it initially. And it's our understanding that they were aware of the nonconforming status of the property. And up to that time the plant had been nonconforming for about 15 years.

Due to the closing of the Riley Tar plant, the city began to look at its land use plans for that area and in 1980 updated – did a major update to its comprehensive plan for the entire City of St. Louis Park, went through a

lengthy public process and that process resulted, among other things, in a reguiding, if you will, of the land use in and around the Apple Valley Ready-Mix site predominantly from industrial to residential. In fact, the Apple Valley Ready-Mix property was reguided to residential property. However, the use was allowed to remain.

In 1981, Apple Valley Ready-Mix wanted to do a number of improvements to their facility. However, [53] because the use was nonconforming, our ordinance, as is the case in all city's ordinances, really did not allow those improvements to be made. However, the city entered into a written agreement with AVR that said they could make the improvements if they agreed to close in five years. They signed that agreement. However, for various reasons, AVR reneged on that agreement.

UNIDENTIFIED SPEAKER: Mr. Chairman.

MR. CHAIR: Let's –

UNIDENTIFIED SPEAKER: Mr. Chairman, my question is on this point.

MR. CHAIR: Okay.

UNIDENTIFIED SPEAKER: Did the City of St. Louis Park sue AVR on breach of contract on the 1981 agreement, or was it just your contention that they reneged? Has there been any judicial finding that they reneged?

MR. HARMONING: Mr. Chair, members of the committee, I think I'll allow our city attorney to answer that.

MR. SCOTT: Yes. There were court proceedings and it was recognized that they had reneged.

MR. CHAIR: If you could state your name for the record, sir, so we have it.

MR. SCOTT: I'm sorry. I'm Tom Scott, the [54] city attorney for St. Louis Park.

MR. CHAIR: Thank you.

MR. SCOTT: So there was a finding in a prior court case that they had reneged on the agreement, but it was not treated as an agreement. Without getting into too much detail, that basically they were able to renege on it, without getting into the details of what went on in the early '80s.

UNIDENTIFIED SPEAKER: Mr. Chairman, now I am confused. There's an offer, there's consideration, and there's acceptance. Then there's breach of that contract. You're saying there's a judicial finding of breach, but they found that there was no contract so there was no either money damages or specific performance.

Is that basically the testimony here?

MR. CHAIR: Mr. Scott?

MR. SCOTT: Well, if you want – I can – I wasn't involved personally in the case in the mid-1980s that went on. Basically, the city and AVR entered into an agreement in the context of litigation that was going on that depending on the outcome of the litigation which ultimately went to the court of appeals, that if AVR was found to be a legal nonconforming use, which it was, that it would then close

– it would be allowed to do the [55] improvements it wanted and it would close in five years.

The court case simply says that AVR reneged on that agreement and it's in the context of an agreement in the context of litigation depending on the outcome of the litigation. It is not simply a straight contractual type of situation between the city and AVR that went on.

REPRESENTATIVE ABRAMS: Well, then, Mr. Chairman, they reneged on something, but it wasn't a legally binding agreement, otherwise you wouldn't have had to go through amortization. You would have been able to enforce a contract. Would that be correct, Mr. Scott?

MR. CHAIR: I understand where you're going, Representative Abrams. I think this is getting – we're getting beyond the scope that I've set and I understand where – I understand where you're going.

Representative Vandeveer.

REPRESENTATIVE VANDEVEER: Mr. Chair, I just – I want to make sure I understand this amortization. Now, when I go buy a piece of real estate that I'm going to put my office in or my business in or whatever, I don't view it every year as amortizing that way. I look at it as amortizing up. In other words, it's going to continually go up in value. I've made an investment in a piece of property that's zoned for a particular use that has a particular use and then I [56] anticipate that it's going to go up in value and then when I retire, I'm going to be able to sell this.

Now, it looks to me like this is based on the assumption that once the city changes the zoning and decides that this is how it's going to be, the value of the property is now

going down. And maybe you can – is that a correct kind of an analysis, do you think or –

MR. SCOTT: The basic concept is it deals only with nonconforming uses and with a nonconforming use the city –

UNIDENTIFIED SPEAKER: Mr. Chair, but the nonconforming use was dictated – at least in this particular case, the nonconforming use was completely within the control of the city, is it not? I mean, it could be conforming when I buy it and it could go nonconforming and – is that correct?

MR. SCOTT: In this case, you're looking at the particular owner at the time he invested – he or she invested in the property and, in this particular case, the owner invested in a property that was already nonconforming. So in looking at – in looking at how you would apply amortization, you look at the property –

UNIDENTIFIED SPEAKER: Mr. Chair, I guess I'm looking at a 1954 plant, construction in 1959, so five years later it becomes nonconforming. At that [57] juncture –

MR. SCOTT: But AVR's investment in the property was in 1974 when it was already non –

UNIDENTIFIED SPEAKER: Mr. Chairman, I'm a little concerned with what this amortization means to the person in the 1959 scenario because if the city switches this, makes you nonconforming when you're conforming, you have a buyer coming in, when you told AVR that this was nonconforming, they said, well, we're going to have a little talk about the price then because in that – exactly, and what I'm sure went on because now what you have

that you built the new plant on is now a legal nonconforming use and so any potential buyer knows that and when they go to buy it, you're dead.

Is that a correct –

MR. SCOTT: You shouldn't confuse the status of a nonconforming use with amortization. We have a nonconforming use law and I think that has been referenced as you – that impacts the fact that you can't expand the nonconforming –

UNIDENTIFIED SPEAKER: But, Mr. Chair, isn't nonconforming the trigger for this or a pot – for first stage of –

MR. SCOTT: The first step is –

UNIDENTIFIED SPEAKER: – being able to do [58] it?

MR. SCOTT: Yes, absolutely. The first step is –

UNIDENTIFIED SPEAKER: Okay. So you never know – you never know when they're going to actually pull the trigger? It just loads a rifle? Is that –

MR. SCOTT: A city can change its zoning regulations and make an existing use nonconforming.

UNIDENTIFIED SPEAKER: And in my view, Mr. Chair, that's a regulatory taking, but that's just me.

UNIDENTIFIED SPEAKER: No, it's not.

MR. SCOTT: I'm sorry. We have a limited amount of time and maybe Mr. –

MR. CHAIR: I know. Representative Rukavina, try to give them a chance to finish their presentation.

UNIDENTIFIED SPEAKER: Well, I think we can read the presentation. My question goes to the fact that why, in this process somewhere, wasn't eminent domain used where this person got paid for their property? It was too expensive or what was the deal?

MR. SCOTT: The main focus of the city was not to acquire the property for a public use. The main focus of the city was to change the use to a conforming use which, in this case, is high density residential property.

[59] REPRESENTATIVE RUKAVINA: So Mr. Chair –

MR. CHAIR: Representative Rukavina.

REPRESENTATIVE RUKAVINA: – and sir, was it then the city's wish to have the owner then, the AVR and in the beginning the other company, to have to tear down the ready-mix plant and clean everything up and get it ready for residential? Is that the intent?

MR. SCOTT: Well, we're – from where we go from here is an open question. As to other – other aspects or other things – tools that may be available in the process of reconverting this site to residential. There may be other things that come into play that the city may be able to look at as to exactly how that happens and potential assistance to the property owner.

We're just at the stage right now, as I think was mentioned, where the process has been completed, the court process has been completed and the use has stopped.

Where we go from now and here in making this into good residential which, by the way, was really conceded by AVR's appraisal in these proceedings, that this is good high density residential property. Secondly, the city has invested incredible sums of money in this surrounding area in the last decades to increase the value of AVR's property for high density residential use.

REPRESENTATIVE RUKAVINA: I still don't [60] understand. Why didn't you just use eminent domain?

MR. SCOTT: Again, the foc – there was no basis for the city actually acquiring the property. We put this in place to –

REPRESENTATIVE RUKAVINA: Well, you weren't building infrastructure to know where.

MR. SCOTT: – in the future – pardon?

REPRESENTATIVE RUKAVINA: You just said you took – the city took steps. You know, it seemed to me you didn't say infrastructure but you meant it, that you took steps to develop around it and that.

MR. SCOTT: We took steps to put infrastructure in place which certainly impacts on the positive side this property and its value for – for what is an appropriate use under the city's comp. plan and its zoning ordinance, which is for high density residential property.

MR. CHAIR: If you got – if you want to finish up, I think you have about three minutes. That's giving you a little extra time for the questions that were asked. So if you want to wrap up, we'd appreciate that.

UNIDENTIFIED SPEAKER: Well, Mr. Chair, members of the committee, I think it was pointed out that the committee members were able to read the information [61] that we provided to them so I won't necessarily go through each of these points one by one, but suffice to say I think it's clear that the use of amortization in this particular case was not a cavalier type of decision, it was not a situation where the city decided on – in January that it no longer liked this business and it [sic] amortization advertised that business out in June. This is a case that has 40 years of history with it and a situation where over at least 20 years' worth of land use planning for this area much thought and consideration was given as to how that particular area should be developed.

I would also point out that this is an extreme case in that the use itself has created some health safety issues in terms of the byproducts, if you will, of the use – noise, traffic, dust – which have created strong concerns for persons who live or work around that particular area.

So, I think in summary, it's important to understand that amortization is used highly – or very infrequently. It's used in very unique situations, extreme situations, and the tests that have to be met in order for the city to be successful in amortizing are quite high.

MR. CHAIR: Does the league have anybody else they want to testify?

Representative Reuter.

[62] REPRESENTATIVE REUTER: Thank you, Mr. Chairman.

Since Mr. Brooker couldn't answer my question, and I'm trying to understand this process myself. Could the

City of Bloomington today go out and measure how close the nearest single family home is to the Mega-Mall and then in their next city council meeting pass a new ordinance that says no shopping center with more than 500,000 square feet in it can be within "X" number of feet of a single family home and therefore start this nonconforming process? And as of that passage of that city ordinance, the Mega-Mall would be in nonconformance and they can start this process and it might take them 35 or 40 years, but they could do that?

MR. SCOTT: The city can, as we've already discussed, change the rules and make certain uses conforming.

UNIDENTIFIED SPEAKER: They can just shut them down.

MR. SCOTT: Now, I'd like to make one – one comment has been mentioned by Mr. Brooker. In 1968 was when the supreme court in Minnesota recognized amortization. I listened fairly carefully to the witnesses that were presented on the other side. I didn't actually – and I still haven't heard any actual abuse where the city actually followed through and [63] enacted an amortization ordinance to really impact what would be considered to be a fairly benign neighborhood business or anything to that extent.

I just – I honestly haven't actually heard the case where it's happened in 30 years. So it's been here, it is recognized by many jurisdictions and –

UNIDENTIFIED SPEAKER: Quickly, Mr. Chairman, and with all due respect, there's a lot of things the

court rules as being acceptable, being legal, being constitutional, but that doesn't make them right.

MR. SCOTT: No. I haven't even heard of a case where the city council follow [sic] through and did anything like that. I'm not talking about anything that got – I'm sure the other side has scoured the bushes, but I haven't heard an actual case so I would like to bring that to the committee's attention.

MR. CHAIR: Thank you.

UNIDENTIFIED SPEAKER: I will wait for the offer to (inaudible words).

MR. CHAIR: If there's no more questions, Representative Larsen, I will point out that I would like to get Representative Abrams to his tax committee because I want my money back.

REPRESENTATIVE ABRAMS: It's been adjourned until tomorrow, Representative Tuma.

[64] MR. CHAIR: Oh, then I could quit early, huh?

UNIDENTIFIED SPEAKER: You didn't earn any money this year. You only gave them money.

REPRESENTATIVE LARSEN: Mr. Chair, members of the committee, I will make this very brief because I do know Representative Rukavina has a bill up after this and quite a few people have come a very long – have come a very long way to testify on that bill.

I was just sitting back there thinking that I didn't realize that I would be put into such a light for carrying this bill, and I have been here only five years and I don't

think I have to explain to any one of you what my moral standards are and I am very hurt. My daughter is in the audience and I though about calling Lori to come down here and having her tell you that I'm really a good person. I decided no, you all know me. So I'm hoping that you will go on that basis.

I would also like to clarify a little bit of law. Adult book stores, saunas are all covered under the first amendment. Even with amortization you could not get rid of them. You can rezone them, you can put them in the middle of a farm field. This bill does not stop that from occurring.

Not one of the people who came down here to testify in support of the bill owned a sex shop, not one. And I [65] also do know that they were amortized out and I'm not going to waste your time by calling them back down and having them retestify for people who were not listening very well.

Amortization is based on the fact that someone's property has lost its value. You have done all your tax deductions and you have nothing, but to that business owner that property is worth something. That is their livelihood. That is how they make a living. Bottom line.

Representative Rukavina, you said you didn't really like the people sitting here beside each other, and I think that should [sic] said to you that this is not a politics bill. This is a policy bill. And you know as well as I do policy crosses party lines. Different people, strange bed partners many, many times because this is a fair policy to the people of this state, to the business owners of this state.

Our governments do have tools. You're right, they have eminent domain, they have condemnation, they can rezone. They have a lot of things they can do. And they were thrilled to get this court ruling because this gave them power beyond the scope of what they need.

I would ask for your support of the bill. Thank you very much.

[66] MR. CHAIR: Seeing no more amendments in front of me or questions to the author – Representative Hasskamp, you did have a question.

REPRESENTATIVE HASSKAMP: Mr. Chairman, I had asked just to reserve – to make a comment.

MR. CHAIR: I apologize, Representative Hasskamp.

REPRESENTATIVE HASSKAMP: I know that League of Cities was here, and this is real tough for those of us who understand that the – we'll say the concerns and the problems and the frustrations of a city, but Representative Larsen, does your bill preempt any effort that we might have coming back with some proposals if the cities need another tool to deal with removing or moving a sexually-explicit business away from a vulnerable area?

You know, I consider most big signs the visual pollution. I mean, I don't like them. I'd love to find a way to deal with them because I think that they're almost pollution. However, you have raised an incredible point here on the fairness issue. And despite the fact we may not like a business, we may want to look at a new way of rezoning or having different types of things in a new area that doesn't preclude the responsibility to compensate.

And I think that's what you're saying here, is [67] there's got to be a fair process and a compensation for what people have put into it and not just taking it because even if it's a bad business that you may not like, it's in the eye of the beholder as Representative Abrams says. To some – what one may think is a bad business, the others may love it. So I commend you for the fortitude.

And I don't know what's going to happen and who are going to try to turn this issue around on us for trying to do what's right and fair and just, but I'm going to be with you on this because it is a fairness issue and I hope that we can find a way with the cities to give them a tool if this is repealed to deal with those businesses that are a problem for all of those living in those communities. So I applaud you for holding up to all this attack.

REPRESENTATIVE LARSEN: Thank you very much, Representative Hasskamp, and certainly I think many people around the table would work with you to make sure that cities do not get stuck with businesses that they don't think are appropriate to be by schools or churches or anything else. I know this bill does not prevent cities from taking action against them. Thank you.

MR. CHAIR: Representative Larsen renews her motion that House File 896 be recommended to pass as [68] amended and referred to the floor.

REPRESENTATIVE LARSEN: Thank you, yes.

MR. CHAIR: Hearing no further discussions, all those in favor signify by saying aye.

UNIDENTIFIED SPEAKERS: Aye.

MR. CHAIR: All those opposed nay.

(No response heard on tape.)

MR. CHAIR: Motion passes.

REPRESENTATIVE LARSEN: Thank you very much.

UNIDENTIFIED SPEAKER: Thank you, Mr. Chairman, members of the committee.

EXHIBIT D

TRANSCRIPTION OF CASSETTE TAPE LABELED

"SEN LOCAL & MET

3-8-99, 2/2."

SENATE FILE 854

* * *

[3] INDEX

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[4] (Beginning of Side 1 of cassette labeled, "Sen Local & Met, 3-8-99, 2/2.")

UNIDENTIFIED SPEAKER: Mr. Chairman, I support Senator Hottinger's amendment, but I just want to say that it is another case of us doing something which is unnecessary. You know, I'm trying to figure out what the proponents of this bill don't like about Amendment 5 to the United States Constitution which says that, "Nor shall private property be taken for public use without just compensation." It's like that statement is not clear enough for them. Or Minnesota's Constitution which says that "Private Property shall not be taken, destroyed, or damaged for public use without just compensation, therefore first paid or secured."

The cases that have supported amortization have made sure that in every case the state – the local government is complying with those provisions of the federal and Minnesota constitutions and so what we're – what the courts have done is construe those. They've also construed the equal protection clause and the due process clauses of

our constitutions and concluded that amortization satisfies those.

So what Senator Hottinger's amendment with Senator Langseth's bill would do would mean that a court would interpret those constitutional provisions which we can't [5] change and which we all respect, and this language. So it just complicates the job of the courts, but it's much preferable to Senator Langseth's bill.

I found really interesting the provision from Senator Langseth's bill where he concluded that amortization is okay for some businesses. So we've now moved away from the point of principle that amortization is wrong to say its okay for some businesses and let's find out what businesses it's okay for.

Unlike Senator Olson's conclusion that it's only businesses that are unlawful, if you read 617B1, Subdivision 2, Part 9, it says that "A nuisance involves a violation by a commercial enterprise of a local or state business licensing regulation, ordinance, or statute prohibiting the maintenance of a public nuisance as defined in 609.74.

609.74 says, "Maintain or permit a condition which unreasonably annoys, injures, or endangers the safety, health, morals, comfort or repose of any considerable number of members of the public."

So what I'm trying to figure out is – I mean, the courts concluded that the Apple Valley Ready-Mix was not a public nuisance. That's in the history that you've got. But it certainly endangered the health and the repose of the members of that community so it's close [6] enough to be a public nuisance.

So what we're doing by passing Senator Langseth's bill unamended by Senator Hottinger's amendment is creating a new battle ground over this as to whether it's a public nuisance under 609.74. And then amortization's okay. We aren't getting anywhere. What we ought to do is just leave the law as it is, let the courts and the constitution control the fact that Minnesotans, Americans are entitled to compensation if there's an unjust taking of their property.

MR. CHAIR: (Inaudible words.)

UNIDENTIFIED SPEAKER: Thank you, Mr. Chairman. I just have to comment on Senator Kelly's question about what it is proponents of the bill don't like about the constitutional – Amendment 5, I believe you mentioned.

Perhaps it has to do with the fact that the courts don't see it the same way as individuals reading the constitution would, and that is a taking doesn't have to arise to a 90-percent plus threshold in order to be compensable, and they refuse to enact anything that's under the 90 percent in the courts. So all the people who are having less than 90 percent takings are not compensated and therefore it is unjust and I think we ought to look at it.

[7] MR. CHAIR: (Inaudible words.)

UNIDENTIFIED SPEAKER: I'm going to pass.

MR. CHAIR: You better move quickly.

UNIDENTIFIED SPEAKER: Mr. Chairman, I disagree with that. You know, I just counted 16 towns in my district. If I ever saw one of them – I never interfere with county business or city business, but if I ever saw one

of them use amortization to condemn or to go after a building without going through the condemnation process, I'd stick my nose into it.

We have the condemnation process. If you're going to take people's property, go through the system. People have that right. I think it's the cornerstone of our democracy. And I have never seen one of my towns using it, and I did not know it was such a big issue until this bill came in front of this committee, but I think there's something wrong when any city anywhere, and I'll tell this to my cities, 16 of them, I'll write them a letter and say the same thing, if I ever see you use amortization rather than going through a condemnation process, I'll get into it and we'll get a new council, because that's what this country's based upon.

I was condemned – I know what it's like. I was in Bloomington and got condemned on a piece of property, but at least Bloomington went through the condemnation [8] process.

MR. CHAIR: Senator Pappas.

SENATOR PAPPAS: Mr. Chairman, Senator Hottinger, I was just wondering if you would accept an oral amendment to incorporate into your bill that would just streamline the process a little bit more? On page 1, Line 32, to delete individualized and at the end of the line to delete each and substitute the?

SENATOR HOTTINGER: Mr. Chairman and Senator Pappas, no, I would not.

SENATOR PAPPAS: You would not?

SENATOR HOTTINGER: Individualized assessment is very important. Every business needs to have the right to appear in front of the city council and, just as Mr. Veath (phonetic) said, explain their case why that should appear. I think the courts require that because this is a heavy tool and they want to give every business the right to appear and make their own argument.

MR. CHAIR: Senator Olson.

SENATOR OLSON: Well, Mr. Chairman and Senator Langseth, where is the bill in statute that your – your bill would in fact repeal? Where is amortization described and defined as a statute?

SENATOR LANGSETH: Mr. Chairman, Senator Olson, the concept of amortization is entirely a creation [9] of the courts in Minnesota. The courts recognized the use of amortization in 1968, as Senator Hottinger has stated, and very shortly thereafter the Minnesota legislature closed that door in the case of an outdoor advertising industry by requiring compensation when you take a building – outdoor advertising structures that are on state right-of-way. So the legislature responded in 1968 when the courts acted.

In 1998, the courts have now acted again and recognized amortization as a prerogative of the cities absent any other statutory language that prohibits it. So we're now back saying enough of that. You've said once in the 1980s that amortization shouldn't be used, now the courts have said that you should again, and it's our view that the legislature needs to act and make it clear that amortization is not something that's permitted in Minnesota. Compensation is what the business owners are entitled to.

UNIDENTIFIED SPEAKER: It's been there for 30 years.

MR. CHAIR: Senator Flynn.

SENATOR FLYNN: Mr. Chair. Senator Langseth, do you support or oppose Senator Hottinger's amendment?

SENATOR LANGSETH: I oppose it.

SENATOR FLYNN: Thank you.

[10] MR. CHAIR: Members, it's getting late. Senator Hottinger moves "A" to amendment. all those in favor.

UNIDENTIFIED SPEAKER: Could we have a roll call, Mr. Chairman?

MR. CHAIR: Pardon?

UNIDENTIFIED SPEAKER: Could we have a roll call on that amendment?

MR. CHAIR: You certainly can. That's your right.

Senator Hottinger moves adoption of the "A2" amendment. Roll call has been asked for. The secretary will take the roll.

MADAM SECRETARY: Day? [sic]

SENATOR DAVE: No.

MADAM SECRETARY: Flynn?

SENATOR FLYNN: No.

MADAM SECRETARY: Higgins?

SENATOR HIGGINS: Yes.

MADAM SECRETARY: Hottinger?

SENATOR HOTTINGER: Yes.

MADAM SECRETARY: Kelly?

SENATOR KELLY: Yes.

MADAM SECRETARY: Langseth?

SENATOR LANGSETH: No.

[11] MADAM SECRETARY: Lessard?

SENATOR LESSARD: No.

MADAM SECRETARY: Lourey?

SENATOR LOUREY: Yes.

MADAM SECRETARY: Olson?

SENATOR OLSON: No.

MADAM SECRETARY: Pappas?

SENATOR PAPPAS: Yes.

MADAM SECRETARY: Pariseau?

SENATOR PARISEAU: No.

MADAM SECRETARY: Price?

SENATOR PRICE: Yes.

MADAM SECRETARY: Robling?

SENATOR ROBLING: No.

MADAM SECRETARY: Scheevel?

SENATOR SCHEEVEL: No.

MADAM SECRETARY: Wiger?

(No response heard on tape.)

MADAM SECRETARY: Vickerman?

SENATOR VICKERMAN: No.

UNIDENTIFIED SPEAKER: Mr. Chair, I move the bill.

MR. CHAIR: The amendment fails 6 to 8. Senator Langseth renews his motion on Senate File 854 as amended be recommended back.

[12] UNIDENTIFIED SPEAKER: Mr. Chairman, could I have a roll call on that motion too.

MR. CHAIR: That's right. You have that right. It will be referred to the floor. Senator Langseth renews his motion. roll call has been asked for on Senate File 854. The secretary will take the roll.

MADAM SECRETARY: Day? [sic]

SENATOR DAVE: Yes.

MADAM SECRETARY: Flynn?

SENATOR FLYNN: Yes.

MADAM SECRETARY: Higgins?

SENATOR HIGGINS: No.

MADAM SECRETARY: Hottinger?

SENATOR HOTTINGER: No.

MADAM SECRETARY: Kelly?

SENATOR KELLY: No.

MADAM SECRETARY: Langseth?

SENATOR LANGSETH: Yes.

[11] MADAM SECRETARY: Lessard?

SENATOR LESSARD: Yes.

MADAM SECRETARY: Lourey?

SENATOR LOUREY: No.

MADAM SECRETARY: Olson?

SENATOR OLSON: Yes.

MADAM SECRETARY: Pappas?

[13] SENATOR PAPPAS: No.

MADAM SECRETARY: Pariseau?

SENATOR PARISEAU: Yes.

MADAM SECRETARY: Price?

SENATOR PRICE: No.

MADAM SECRETARY: Robling?

SENATOR ROBLING: Yes.

MADAM SECRETARY: Scheevel?

SENATOR SCHEEVEL: Yes.

MADAM SECRETARY: Wiger?

(No response heard on tape.)

MADAM SECRETARY: Vickerman?

SENATOR VICKERMAN: Yes.

UNIDENTIFIED SPEAKER: Senator Hottinger, how come you're a co-author on the bill?

SENATOR HOTTINGER: Because I didn't –

MR. CHAIR: The amendment is adopted on the – the amendment is adopted.

UNIDENTIFIED SPEAKER: How come all of us knew about your amendment before you walked in and it didn't take any debate or reading to do it.

(End of cassette labeled, "Sen Local & Met, 3-8-99, 2/2.")

(Beginning of cassette labeled, "2.")

UNIDENTIFIED SPEAKER: Senator Langseth, [14] before you start, there is an identical bill by Senator Scheid and Senator Olson and Senator Robling that we will be acting on your Senate File 854.

SENATOR HIGGINS: Mr. Chair.

MR. CHAIR: Senator Higgins.

SENATOR HIGGINS: Chair, I'd like to tell members that on Senator Robling's bill I had to have my name removed as a co-author.

MR. CHAIR: Senator Langseth.

SENATOR LANGSETH: Mr. Chair, this is a simple little bill. I think we just (inaudible words). There's no sense in getting too excited. Is there a motion.

As you can see by the bill, it's just a half-a-page bill, but basically it prohibits counties and cities from enacting on them being more enforcing in an ordinance providing for the elimination or termination of a use by amortization if the use was lawful at the time it was enacted. I think I will just ask Peter to go into more depth about the background of the bill.

UNIDENTIFIED SPEAKER: Mr. Langseth, I'm only going to allow the proponents 20 minutes roughly –

(WHEREUPON, cassette tape was blank for a few moments and then repeats Side 1 of cassette labeled, "Sen Local & Met, 3-8-99, 2/2.")

— Exhibit E —

STATE OF MINNESOTA

Journal of the Senate

EIGHTY-FIRST LEGISLATURE

THIRTY-NINTH DAY

St. Paul, Minnesota, Thursday, April 8, 1999

The Senate met at 8:00 a.m. and was called to order by the President.

CALL OF THE SENATE

Senator Janezich imposed a call of the Senate. The Sergeant at Arms was instructed to bring in the absent members.

Prayer was offered by the Chaplain, Rev. Wanda R. Copeland.

The roll was called, and the following Senators answered to their names:

Anderson	Hottinger	Langseth
Belanger	Janezich	Larson
Berg	Johnson, D.E.	Lesewski
Berglin	Johnson, D.H.	Lessard
Betzold	Johnson, D.J.	Limmer
Cohen	Johnson, J.B.	Lourey
Day	Junge	Marty
Dille	Kelley, S.P.	Metzen
Fischbach	Kelly, R.C.	Moe, R.D.
Flynn	Kiscaden	Murphy
Foley	Kleis	Neuville
Frederickson	Knutson	Novak
Hanson	Krentz	Oliver
Higgins	Laidig	Olson

Ourada	Solon
Pappas	Spear
Pariseau	Stevens
Piper	Stumpf
Pogemiller	Ten Eyck
Price	Terwilliger
Ranum	Viekerman
Robertson	Wiener
Robling	Wiger
Runbeck	Ziegler
Sams	
Samuelson	
Scheevel	
Scheid	

The President declared a quorum present.

The reading of the Journal was dispensed with and the Journal, as printed and corrected, was approved.

EXECUTIVE AND OFFICIAL COMMUNICATIONS

The following communication was received and referred to the committee indicated.

March 4, 1999

The Honorable Allan H. Spear
President of the Senate

Dear Sir:

The following appointment is hereby respectfully submitted to the Senate for confirmation as required by law:

COMMISSIONER OF THE MINNESOTA DEPARTMENT OF ADMINISTRATION

David Fisher, 5047 Gladstone Avenue South, Minneapolis, Minnesota 55419, in the county of Hennepin, effective

March 15, 1999, for a four-year term expiring on Monday, January 6, 2003.

The question was taken on the adoption of the amendment.

The roll was called, and there were yeas 54 and nays 4, as follows:

Those who voted in the affirmative were:

Anderson	Johnson, D.H.	Lesewski
Belander	Johnson, D.J.	Lessard
Berg	Johnson, J.B.	Limmer
Cohen	Junge	Lourey
Day	Kelley, S.P.	Marty
Dille	Kiscaden	Metzen
Fischbach	Kleis	Murphy
Frederickson	Knutson	Neuville
Hanson	Krentz	Novak
Hottinger	Laidig	Olson
Johnson, D.E.	Langseth	Ourada
Pappas	Solon	
Pariseau	Spear	
Piper	Stevens	
Pogemiller	Stumpf	
Price	Ten Eyck	
Ranum	Terwilliger	
Robertson	Vickerman	
Robling	Wiener	
Sams	Wiger	
Samuelson	Ziegler	
Scheevel		

Those who voted in the negative were:

Berglin Betzold Flynn Foley

The motion prevailed. So the amendment was adopted.

S.F. No. 1262 was read the third time, as amended, and placed on its final passage.

The question was taken on the passage of the bill, as amended.

The roll was called, and there were yeas 59 and nays 0, as follows:

Those who voted in the affirmative were:

Anderson	Hanson	Krentz
Belanger	Hottinger	Laidig
Berg	Johnson, D.E.	Langseth
Berglin	Johnson, D.H.	Lesewski
Betzold	Johnson, D.J.	Lessard
Cohen	Johnson, J.B.	Limmer
Day	Junge	Lourey
Dille	Kelley, S.P.	Marty
Fischbach	Kelly, R.C.	Metzen
Flynn	Kiscaden	Murphy
Foley	Kleis	Neuville
Frederickson	Knutson	Novak
Olson	Robertson	Stevens
Ourada	Robling	Stumpf
Pappas	Sams	Ten Eyck
Pariseau	Samuelson	Terwilliger
Piper	Scheevel	Vickerman
Pogemiller	Solon	Wiener
Price	Spear	Wiger
Ranum		Ziegler

So the bill, as amended, was passed and its title was agreed to.

MOTIONS AND RESOLUTIONS – CONTINUED

Senator Langseth moved that S.F. No. 854 be taken from the table. The motion prevailed.

S.F. No. 854: A bill for an act relating to land use; precluding the termination of lawful land uses by amortization; authorizing the city of St. Louis Park to continue to enforce a certain ordinance; amending Minnesota Statutes 1998, sections 394.21, by adding a subdivision; and 462.357, by adding a subdivision.

CALL OF THE SENATE

Senator Langseth imposed a call of the Senate for the balance of the proceedings on S.F. No. 854. The Sergeant at Arms was instructed to bring in the absent members.

Senator Hottinger moved to amend S.F. No. 854 as follows:

Delete everything after the enacting clause and insert:

"Section 1. Minnesota Statutes 1998, section 394.21, is amended by adding a subdivision to read:

Subd. 1a. [AMORTIZATION.] *A county must not enact or amend a zoning ordinance providing for the termination of a nonconforming use by amortization that does not allow the owner to reasonably recoup the investment in the use prior to its termination. In determining a reasonable amortization period for a particular use, the ordinance must provide for consideration of the following factors:*

(1) information relating to the structure located on the property;

(2) nature of the use;

(3) location of the property in relation to the surrounding uses;

(4) the character of and uses in the surrounding neighborhood;

(5) cost of the property and improvements to the property;

(6) benefit to the public by requiring the termination of the nonconforming use;

(7) burden on the property owner by requiring the termination of the nonconforming use;

(8) the length of time the use has been in existence; and

(9) the length of time the use has been nonconforming.

Prior to iis consideration of an amortization ordinance, a county must have in its comprehensive municipal plan provisions specifically addressing how amortization would further the policy goals and policies of the plan. In addition to other requirements relating to the amendment of a zoning ordinance, an amortization ordinance must contain a procedure for an individualized assessment of the amortization period for each use being amortized, allow the owner and all other interested parties a minimum of 60 days after the close of the public hearing to submit additional information to the governing body, and be supported by specific findings of fact based upon evidence in the record. No amortization ordinance may be adopted or amended except upon a two-thirds vote of all members of the governing body.

Sec. 2. Minnesota Statutes 1998, section 462.357, is amended by adding a subdivision to read:

Subd. 1c. [AMORTIZATION.] *A municipality must not enact or amend a zoning ordinance providing for the termination of a nonconforming use by amortization that does not allow the owner to reasonably recoup the investment in the use prior to its termination. In determining a reasonable amortization period for a particular use, the ordinance must provide for consideration of the following factors:*

(1) information relating to the structure located on the property;

(2) nature of the use;

(3) location of the property in relation to the surrounding uses;

(4) the character of and uses in the surrounding neighborhood;

(5) cost of the property and improvements to the property;

(6) benefit to the public by requiring the termination of the nonconforming use;

(7) burden on the property owner by requiring the termination of the nonconforming use;

(8) the length of time the use has been in existence; and

(9) the length of time the use has been nonconforming.

Prior to its consideration of an amortization ordinance, a municipality must have in its comprehensive municipal plan provisions specifically addressing how amortization would further the policy goals and policies of the plan. In addition to other requirements relating to the amendment of a zoning ordinance, an amortization ordinance must contain a procedure for an individualized assessment of the amortization period for each use being amortized, allow the owner and all other interested parties a minimum of 60 days after the close of the public hearing to submit additional information to the governing body, and be supported by specific findings of fact based upon evidence in the record. No amortization ordinance may be adopted or amended except upon a two-thirds vote of all members of the governing body.

Sec. 3. [EFFECTIVE DATE.]

Sections 1 and 2 are effective the day after their final enactment."

Delete the title and insert:

"A bill for an act relating to land use; providing standards for the termination of lawful land uses by amortization, amending Minnesota statues 1998, sections 394.21, by adding a subdivision, and 462.357, by adding a subdivision."

The question was taken on the adoption of the amendment.

The roll was called, and there were yeas 19 and nays 47, as follows:

Those who voted in the affirmative were

Anderson	Flynn	Kelley, S.P.
Berglin	Higgins	Krentz
Betzold	Hottinger	Lourey
Cohen	Junge	Marty
Moe, R.D.	Price	
Pappas	Ranum	
Piper	Spear	
Pogemiller		

Those who voted in the negative were:

Belanger	Johnson, D.H.	Lescwski
Berg	Johnson, D.J.	Lessard
Day	Johnson, J.B.	Limmer
Dillie	Kelly, R.C.	Metzen
Fischbach	Kiscaden	Murphy
Foley	Kleis	Neuville
Frederickson	Knutson	Novak
Hanson	Laidig	Oliver
Janezich	Langseth	Olson
Johnson, D.E.	Larson	Ourada
Pariseau	Stumpf	
Robertson	Ten Eyck	
Robling	Terwilliger	
Runbeck	Vickerman	
Sams	Wiener	
Samuelson	Wiger	
Scheevel	Ziegler	
Scheid		
Solon		
Stevens		

The motion did not prevail. So the amendment was not adopted.

Senator Marty moved to amend S.F. No. 854 as follows:

Page 1, lines 11 and 20, before "*A*" insert "*Except as otherwise provided in this subdivision.*"

Page 1, lines 17 and 25, after the period, insert "*This subdivision does not apply to billboards or adults-only bookstores, theaters, or similar adults-only businesses, as defined by ordinance.*"

Senator Stevens moved to amend the Marty amendment to S.F. No. 854 follows:

Page 1, line 5, delete "*billboards or*"

The question was taken on the adoption of the Stevens amendment to the Marty amendment.

The roll was called, and there were yeas 43 and nays 22, as follows:

Those who voted in the affirmative were:

Belanger	Fischbach	Johnson, D.E.
Berg	Flynn	Johnson, D.H.
Day	Hanson	Johnson, J.B.
Dille	Janezich	Kleis
Knutson	Lesewski	
Laidig	Lessard	
Langseth	Limmer	
Larson	Metzan	

Murphy	Ourada	Sams
Neuville	Pariseau	Samuelson
Novak	Robertson	Scheevel
Oliver	Robling	Scheid
Olson	Runbeck	Solon
Stevens	Wiener	
Stumpf	Wiger	
Ten Eyck	Ziegler	
Terwilliger		
Vickerman		

Those who voted in the negative were:

Anderson	Frederickson	Kelley, S.P.
Berglin	Higgins	Kiscaden
Betzold	Hottinger	Krentz
Cohen	Johnson, D.J.	Lourey
Foley	Junge	Marty
Moe, R.D.	Ranum	
Pappas	Spear	
Piper		
Pogemiller		
Price		

The motion prevailed. So the amendment to the amendment was adopted.

Senator Limmer moved to amend the Marty amendment to S.F. No. 854 as follows:

Page 1, line 6, before "*theaters*" insert "*adults-only*"

The motion prevailed. So the amendment to the amendment was adopted.

The question recurred on the Marty amendment, as amended.

The roll was called, and there were yeas 65 and nays 0, as follows:

Those who voted in the affirmative were:

Anderson	Higgins	Laidig
Belanger	Hottinger	Langseth
Berg	Janezich	Larson
Berglin	Johnson, D.E.	Lesewski
Betzold	Johnson, D.H.	Lessard
Cohen	Johnson, D.J.	Limmer
Day	Johnson, J.B.	Lourey
Dille	Junge	Marty
Fischbach	Kelley, S.P.	Metzen
Flynn	Kiscaden	Moe, R.D.
Foley	Kleis	Murphy
Frederickson	Knutson	Neuville
Hanson	Krentz	Novak
Oliver	Samuelson	
Olson	Scheevel	
Ourada	Scheid	
Pappas	Solon	
Pariseau	Spear	
Piper	Stevens	
Pogemiller	Stumpf	
Price	Ten Eyck	
Ranum	Terwilliger	
Robertson	Vickerman	
Robling	Wiener	
Runbeck	Wiger	
Sams	Ziegler	

The motion prevailed. So the Marty amendment, as amended, was adopted.

Senator Junge moved to amend S.F. No. 854 as follows:

Page 2, line 8, after the period, insert "*Sections 1 and 2 do not apply to cases pending on the effective date regarding enforcement of an amortization ordinance.*"

The question was taken on the adoption of the amendment.

The roll was called, and there were yeas 23 and nays 41, as follows:

Those who voted in the affirmative were:

Anderson	Foley	Junge
Berglin	Higgins	Kelley, S.P.
Betzold	Hottinger	Krentz
Cohen	Johnson, D.H.	Lourey
Flynn	Johnson, J.B.	Marty
Moe, R.D.	Ranum	
Pappas	Spear	
Piper	Ten Eyck	
Pogemiller		
Price		

Those who voted in the negative were:

Belanger	Janezich	Langseth
Berg	Johnson, D.E.	Larson
Day	Johnson, D.J.	Lesewski
Dille	Kiscaden	Lessard
Fischbach	Kleis	Limmer
Frederickson	Knutson	Metzen
Hanson	Laidig	Murphy

Neuville	Runbeck	Stumpf
Novak	Sams	Terwilliger
Oliver	Samuelson	Vickerman
Olson	Scheevel	Wisner
Ourada	Scheid	Wiger
Robertson	Solon	Ziegler
Robling	Stevens	

The motion did not prevail. So the amendment was not adopted.

Senator Pappas moved to amend S.F. No. 854 as follows:

Page 1, line 20, after "*municipality*" insert "*that is not a city of the first class*"

The question was taken on the adoption of the amendment.

The roll was called, and there were yeas 14 and nays 48, as follows:

Those who voted in the affirmative were:

Anderson	Kelley, S.P.	Piper
Berglin	Lourey	Pogemiller
Cohen	Marty	Ranum
Flynn	Moe, R.D.	Spear
Higgins	Pappas	

Those who voted in the negative were:

Belander	Janezich	Larson
Berg	Johnson, D.E.	Lesewski
Betzold	Johnson, D.H.	Lessard
Day	Junge	Limmer
Dille	Kiscaden	Metzen
Fischbach	Kleis	Murphy

Foley	Knutson	Meuville
Frederickson	Krentz	Novak
Hanson	Laidig	Oliver
Hottinger	Langseth	Olson
Ourada	Stevens	
Price	Stumpf	
Robertson	Ten Eyck	
Robling	Terwilliger	
Runbeck	Vickerman	
Sams	Wiener	
Samuelson	Wiger	
Scheevel	Ziegler	
Scheid		
Solon		

The motion did not prevail. So the amendment was not adopted.

Senator Marty moved to amend S.F. No. 854 as follows:

Page 1, after line 8, insert:

"section 1. [16A.90] [LOCAL GOVERNMENT REIMBURSEMENT ACCOUNT; APPROPRIATION.]

Upon application by a local government, the commissioner of finance shall reimburse a local government an amount equal to the costs incurred by the local government in acquiring property that has been determined by the local government to be a nonconforming use that must be eliminated or terminated to protect the health, safety, or public welfare of the community, and that would have been subject to amortization but for the provisions of section 394.21, subdivision 1a, or section 462.357, subdivision 1c. An amount sufficient to pay the reimbursement requests of

local governments made during the previous year is appropriated annually from the general fund to the commissioner of finance for the local government reimbursement account established in the state treasury for the purposes of this section."

Page 2, line 7, before "*Sections*" insert "*Section 1 is effective July 1, 1999.*" and delete "*1 and 2*" and insert "*2 and 3*"

Page 2, line 8, delete "*3*" and insert "*4*"

Renumber the sections in sequence and correct the internal references

Amend the title accordingly

The question was taken on the adoption of the amendment

The roll was called, and there were yeas 27 and nays 36, as follows:

Those who voted in the affirmative were:

Anderson	Hottinger	Pappas
Berglin	Johnson, J.B.	Piper
Betzold	Junge	Pogemiller
Cohen	Kelley, S.P.	Price
Fischbach	Kleis	Ranum
Flynn	Lourey	Robertson
Foley	Marty	Sams
Hanson	Metzen	Samuelson
Higgins	Moe, R.D.	Spear

Those who voted in the negative were:

Belanger	Knutson	Murphy
Berg	Krentz	Neuville
Day	Laidig	Novak
Dille	Langseth	Oliver
Frederickson	Larson	Olson
Johnson, D.E.	Lesewski	Ourada
Johnson, D.H.	Lessard	Pariseau
Kiscaden	Limmer	Robling
Runbeck	Vickerman	
Scheevel	Wiener	
Scheid	Wiger	
Solon	Ziegler	
Stevens		
Stumpf		
Ten Eyck		
Terwilliger		

The motion did not prevail. So the amendment was not adopted.

Senator Pappas moved to amend S.F. No. 854 as follows:

Page 1, lines 17 and 25, after the period, insert "*This subdivision does not apply to an ordinance that is approved by the majority of voters voting on the question at a general or special election.*"

The question was taken on the adoption of the amendment.

The roll was called, and there were yeas 8 and nays 54, as follows:

Those who voted in the affirmative were:

Anderson	Kelley, S.P.
Berglin	Pappas
Cohen	Pogemiller
Higgins	Ranum

Those who voted in the negative were:

Belanger	Johnson, D.E.	Lessard
Berg	Johnson, D.H.	Limmer
Betzold	Johnson, J.B.	Lourey
Day	Junge	Marty
Dille	Kiscaden	Metzen
Fischbach	Kleis	Moe, R.D.
Flynn	Knutson	Murphy
Foley	Krentz	Neuville
Frederickson	Laidig	Novak
Hanson	Langseth	Oliver
Hottinger	Lesewski	Olson
Ourada	Solon	
Pariseau	Spear	
Piper	Stevens	
Price	Stumpf	
Robertson	Ten Eyck	
Robling	Terwilliger	
Runbeck	Vickerman	
Sams	Wiener	
Samuelson	Wiger	
Scheevel	Ziegler	
Scheid		

The motion did not prevail. So the amendment was not adopted. S.F. No. 854 was read the third time, as amended, and placed on its final passage. The question was taken on the passage of the bill, as amended. The roll was called, and there were yeas 45 and nays 19, as follows:

Those who voted in the affirmative were:

Belanger	Johnson, D.E.	Lesewski
Berg	Johnson, D.H.	Lessard
Day	Johnson, D.J.	Limmer
Dille	Johnson, J.B.	Metzen
Fischbach	Kiscaden	Murphy
Flynn	Kleis	Neuville
Frederickson	Knutson	Novak
Hanson	Laidig	Oliver
Janezich	Langseth	Olson
Ourada	Samuelson	Ten Eyek
Pariseau	Scheevel	Terwilliger
Robertson	Scheid	Vickerman
Robling	Solon	Wiener
Runbeck	Stevens	Wiger
Sams	Stumpf	Ziegler

Those who voted in the negative were:

Anderson	Junge	Pappas
Berglin	Kelley, S.P.	Piper
Betzold	Krentz	Pogemiller
Cohen	Lourey	Price
Foley	Marty	Ranum
Higgins	Moe, R.D.	Spear
Hottinger		

So the bill, as amended, was passed and its title was agreed to.

SPECIAL ORDER

S.F. No. 983: A bill for an act relating to professions; modifying provisions relating to psychologists' licensing; amending Minnesota Statutes 1998, sections 148.89, subdivisions 2a, 4, 5, and by adding a subdivision, 148.915; 148.925, subdivision 7; 148.941, subdivisions 2 and 6; and 148.96, subdivision 3; proposing coding for new law in Minnesota Statutes, chapter 148.

Was read the third time and placed on its final passage.

The question was taken on the passage of the bill.

The roll was called, and there were yeas 60 and nays 1, as follows:

Those who voted in the affirmative were:

Anderson	Hanson	Krentz
Belanger	Higgins	Laidig
Berg	Hottinger	Langseth
Berglin	Johnson, D.E.	Larson
Betzold	Johnson, D.H.	Lesewski
Cohen	Johnson, D.J.	Lessard
Day	Johnson, J.B.	Limmer
Dille	Junge	Lourey
Fischbach	Kelley, S.P.	Marty
Flynn	Kiscaden	Merzen
Foley	Kleis	Moe, R.D.
Frederickson	Knutson	Murphy
Neuville	Ranum	Spear
Oliver	Robertson	Stevens
Olson	Robling	Ten Eyck
Ourada	Sams	Terwilliger
Pappas	Samuelson	Vickerman
Pariseau	Scheevel	Wiener
Piper	Scheid	Wiger
Pogemiller	Solon	Ziegler

Those who voted in the negative were:

Runbeck

So the bill passed and its title was agreed to.

SPECIAL ORDER

S.F. No. 1618: A bill for an act relating to liquor; modifying judicial remedies pertaining to brewers and wholesalers, providing for a right to jury trials; amending Minnesota Statutes 1998, section 325B.08.

Was read the third time and placed on its final passage.

The question was taken on the passage of the bill.

The roll was called, and there were yeas 65 and nays 0, as follows:

Those who voted in the affirmative were:

Anderson	Higgins	Laidig
Belanger	Hottinger	Langseth
Berg	Janezich	Larson
Berglin	Johnson, D.E.	Lesewski
Betzold	Johnson, D.H.	Lessard
Cohen	Johnson, D.J.	Limmer
Day	Johnson, J.B.	Lourey
Dille	Junge	Marty
Fischbach	Kelley, S.P.	Metzen
Flynn	Kiscaden	Moe, R.D.
Foley	Kleis	Murphy
Frederickson	Knutson	Neuville
Hanson	Krentz	Novak
Oliver	Robertson	Stevens
Olson	Sams	Stumpf
Ourada	Robling	Ten Eyck
Pappas	Runbeck	Terwilliger
Pariseau	Samuelson	Vickerman
Piper	Scheevel	Wiener
Pogemiller	Scheid	Wiger
Price	Solon	Ziegler
Ranum	Spear	

[125] Exhibit H

MR. TIGUE: That's all the questions I have.

THE COURT: Any questions, Mr. Gherty?

MR. GHERTY: No.

THE COURT: Step down.

MR. TIGUE: Plaintiff calls Paul Bern.

PAUL BERN

being first duly sworn upon oath to testify to the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. TIGUE:

Q Mr. Bern, would you state your full name for the record spelling your last name?

A Paul, no middle initial, Bern, B-E-R-N.

Q And, Mr. Bern, what is your present address?

A Business or home?

Q Either one.

A Business address 2341 East Lake Avenue, East Seattle, Washington, 98102.

Q And, Mr. Bern, what is your occupation?

A I'm the director of operations for consolidated bookkeeping and management services.

Q Okay. And could you tell the Court what consolidated bookkeeping and management – bookkeeping and management services is?

[126] A We provide the management and administrative support to the Deja Vu night clubs in Washington, Colorado and Hawaii.

Q And what are – first of all, what are the Deja Vu night clubs?

A The Deja Vu night clubs are adult entertainment cabaret's that provide nude and semi-nude entertainment.

Q Okay. And do they – are they – are they alcohol-serving clubs or nonalcohol serving clubs?

A With the exception of Hawaii they are all juice bars.

Q Okay. And for approximately how many clubs do you provide services?

A Nine.

Q And could you describe the type of services that your company provides for all of these clubs?

A Well, I was hired to set up the systems and procedures for the Deja Vu night clubs and hire a – trained management and to take care of all of the bookkeeping needs of the clubs.

Q Now, as part of – are part of your duties, in terms of managing the Deja Vu clubs, travel – your duties include traveling the country and looking at other clubs operated by other business [sic]?

A When I first started with consolidated, one of the [127] first things they did was send me around the nation to look at other clubs, yes.

Q And approximately how many other clubs have you looked at over the course of your employment with consolidated bookkeeping management?

A Gosh, I've never added them up but I would say 35 to 50.

Q And in addition to – in addition to personally visiting and examining several other clubs, do you regularly read any trade publications within the adult entertainment industry?

A Yes.

Q And what trade publications would you read?

A Probably the number one trade publication that I read is Exotic Dancer Bulletin.

Q Okay. And that's the same – where are the exhibits. That's the same publication that is identified in Exhibits 3, 4 and 5, I believe, is that correct?

A Yes.

Q And for what reason would you – I'm sorry. What types of information would you gain from reading Exotic Dancer magazine?

A The biggest reason I read it is to try and get news of what's going on across the nation and what's going on in the industry.

[128] Q Now, Mr. Bern, in addition to your traveling and looking at other clubs and in addition to keeping up

with trade industry publications, do you ever – do you ever in – do you ever attend meetings or conventions in the adult entertainment industry?

A They've got a yearly convention they hold down in Las Vegas that I've attended for the last two years.

Q And, again, what do you – for what purpose would you go to these trade industry conventions?

A The biggest reason is to listen to what's being talked about in the seminars.

Q And what types of things do you learn about the seminars?

A You mean what is the subject matter?

Q Yes?

A Last two years a lot of it has been really dominated by what I call the four-foot rule and the distance requirements that are happening across the nation.

Q Could you generally describe the type of entertainment that the Deja Vu Clubs provide?

MR. GHERTY: Objection. Relevancy to this proceeding.

THE COURT: What is the relevance?

MR. TIGUE: Well, I –

THE COURT: I assume there's some, but why [129] not just get us there quicker.

MR. TIGUE: The offer of proof would be they provide the identical type of entertainment that Centerfold's Cabaret provides. And I do intend to offer some

evidence as to the financial impact of the distance requirement. And as foundation I want to establish that they – that in fact provide the identical entertainment.

THE COURT: Okay. Go ahead.

A In most of our clubs we have one to two stages the dancers perform on one at a time. And then we – we don't, the dancers provide personal dances either table dances or couch dances in the clubs.

Q (By Mr. Tigue, continuing) What type of financial arrangements do you have with – with the dancers?

A All of our dancers are independent contractors so they are really tenants of each club. And they pay us a base rent plus a rent off dances to perform at that club. They come in and set their hours, set – in their contract state how many shifts they want to work a week.

Q Okay. And how do the dancers in your clubs earn money then?

A The number one way that they earn money is through the personal dances, private dances, couch and table [130] dances, mostly couch.

Q Okay. Now, how long have you been – how long have you been employed at consolidated bookkeeping and management?

A I started in November of '92. So a little under seven years.

Q All right. And during the course of your seven years, have you had any clubs that have, during the course of the seven years, become subject to distance requirements

such as the five-foot distance requirements in – that are at issue in this case?

A Yes.

Q Okay. And beginning with the shortest distance requirement and longest distance requirement, what types of requirements have your clubs been subject to?

A On the main – on the floor, off the stages, I have a four-foot rule where the dancer cannot be any closer than four feet to the customer and on the stage from six to eight feet. So the longest is eight feet.

Q Okay. Now, as the person who's in charge of bookkeeping and maintaining financial records for all of these clubs, have you had occasion to examine the financial performance of your – of your clubs both before and after these distance requirements went into effect?

[131] A Yes.

Q Have you produced – have you produced in court rec – before and after records of financial performances of the Deja Vu clubs as they relate to the distance requirement?

MR. GHERTY: Objection as to vague. What courts?

THE COURT: Well, just answer this one yes or no. Have you done that?

THE WITNESS: To the courts?

THE COURT: Right.

Q (By Mr. Tigue, continuing) And I asked if you brought to court – let me phrase it this way. Have you brought to court today –

A Yes.

Q – financial records that would show – that would show a before and after picture of the financial performance of the club before the adoption of these distance requirements and after the adoption of the distance requirements?

A Yes.

Q Okay. And are these records that you would maintain in the normal course of business?

A Yes.

Q And within consolidated bookkeeping management are you [132] the custodian of these records?

A Yes.

Q All right.

THE COURT: Is this for more than one club by the way?

THE WITNESS: Yes, sir.

THE COURT: Like how many clubs?

THE WITNESS: I brought records for four clubs.

THE COURT: Four clubs?

THE WITNESS: Yes.

MR. GHERTY: Might as well throw it out. I'm going to object to relevancy as to any line of questioning concerning these clubs. Unless something new has developed, Mr. Gunderson is not affiliated with Deja Vu or this management company and it is not relevant.

THE COURT: Well, I'm not sure how relevant it is but instead of retrying the case I'm going to let it in, but it is for what it's worth, okay.

MR. GHERTY: To quote your predecessor, give it what weight it may be worth.

THE COURT: Yeah, I think I've memorized that phrase.

MR. GHERTY: I've heard it before.

[133] MR. TIGUE: I believe we're on Exhibit 10, is that correct?

THE WITNESS: Excuse me the top copies are behind in case you are going to ask me to refer to anything.

THE COURT: Okay. Mr. Bern, do you have anything marked on there?

THE WITNESS: I have marked when the ordinance went into effect.

THE COURT: Okay. As to the particular setback as to that club and whatever?

THE WITNESS: No, sir.

THE COURT: Okay. Do you have any recollection of what that could be?

THE WITNESS: All clubs in the state of Washington are four foot with the exception of the stage. Some stages are six foot away from the tip rail and some are eight foot.

THE COURT: All right. So we should look at all of these as if it is four feet.

THE WITNESS: Yes, sir. Do you want me to help you –

MR. TIGUE: No thank you.

THE WITNESS: – together –

Q (By Mr. Tigue, continuing) Mr. Bern, I'm showing you [134] what has been marked for identification as Exhibit 10.

THE COURT: Did you mark that or is there a yellow sticker?

MR. TIGUE: I don't have a yellow sticker.

THE COURT: The stickers readily identify the exhibits so please use those.

Q (By Mr. Tigue, continuing) Mr. Bern, I'm showing you what's been marked for identification as Exhibit 10 and ask you if you can identify that?

A I've got a club in Tukwila, Washington. We call it the Deja Vu airport. And these are the financial records for 1997 and 1998 and through May of 1999.

Q Okay. Now, Mr. Bern, do you – do you have any recollection as to at what point in time the four-foot distant requirement took effect in Tukwila, Washington?

A The four-foot rule took effect in November of 1997.

Q I guess what I would like you to do as – is go through – well, first of all what – what type of record is this that – what type of record is this?

A This is a record that I use that takes our P & L monthly statements and puts them into a yearly statement.

Q All right. And there appears to be a solid line here between October and November of 1997, is that correct?

A Yes.

[135] Q And this fairly and accurately represents – fairly and accurately represents the financial performance of the airport Deja Vu club from January of 1997 to date, is that correct?

A To May of 1999.

Q May of 1999?

A Yes.

MR. TIGUE: All right. I would offer Exhibit 10.

THE COURT: Any objection other than that noted? Received.

Q (By Mr. Tigue, continuing) Mr. Bern, without going through this document line by line, I would like you to – I would like you to go through the document looking at from a before and after standpoint of the financial performance of the Deja Vu clubs as it relates to – as it relates to – as it relates to when the four-foot rule was implemented?

A Okay. I'm really not quite sure how you want me to go through it. It is – the first section is our revenues we arrive at. Revenues through the club are generated through admissions charged at the door, through drinks sold to the customer and ladies' drinks sold to the customer and by – by rents collected from the dancer. And those are the three main areas of our revenue.

[136] Q Okay.

A We sell a little bit of merchandise but it – those are the three main areas that we produce revenue.

Q All right. I want to direct your attention then to the column in October of – October of '97 and then you've got a solid line. And it was your – as I understood your testimony, it was November of 1997 when the four-foot rule took effect?

A Yes.

Q And do you know if it took effect from the first of the month, middle of the month, end –

A I don't remember the exact date.

Q All right. Again, looking at just the revenue side, what happened to your revenue in the first month the ordinance took effect?

A The first month's revenue was down from 46,000, the month before from 36,0000.

Q And again –

A With the biggest majority of that reduction in dancer rents.

Q And, again, what effect did that have on the bottom line? Where would we find that on the chart?

A You would – the way that I've done my declarations is you go to page three. It ends in net income.

Q Okay.

[137] A You take that figure on the very bottom, you go up to G & A costs, and you add back in if there's any consulting fees and any depreciation charge and that becomes your new net income.

Q All right. And, again, why would you add in consulting fees or depreciation?

A Consulting fees are agreements made by principals of Deja Vu, either Deja Vu consulting or my boss has a consulting agreement with the clubs. And we just felt that since it was internal and really discretionary, when times come hard we should not figure on the bottom line when we're doing declarations.

Q And, again, what occurred – what occurred in terms of revenue and profits of the club from November, 1997, forward?

A Well, you can see when – when the – threat's the wrong word. When it became evident to the dancers that the four-foot was going to be enforced in the – in the club, I stated losing dancers before it became in effect. And you can see it by the bottom line – in October and then in November, and again I don't remember the date it did come into effect, and the slide continued. And as you continue on from 1997 to present, you'll see that the slide continues and I'm still losing money.

[138] Q Mr. Bern, I'm showing you what has been marked for identification as Exhibit 11 and ask if you can identify that?

A This is a P & L yearly performance from my club in Spokane, Washington for 1998 and through May of 1999.

Q And, again, are these records maintained by you in the normal course of business?

A Yes.

Q And you're the custodian of these records?

A Yes.

Q And these records fairly and accurately represent – represent the financial performance of the Spokane, Washington club?

A Yes.

Q Now, we don't have it in our copies, but do you – do you have an indication on your copy as to when the ordinance was initially enacted?

MR. GHERTY: I'd like to interpose – sorry to interrupt. If I can impose a standing objection as to anything dealing with financial records concerning Deja Vu and the various clubs. You're talking about four clubs total?

THE WITNESS: Yes, sir.

MR. GHERTY: On all four clubs rather than interrupting him.

[139] THE COURT: All right. You have a standing objection.

MR. GHERTY: Thank you.

A The ordinance was enacted March the 5th of 1998. It was – we, at that time, filed a lawsuit and there was an agreement that enforcement would not take place until it was heard in the courts. So I continued to operate as best I could without a four-foot rule. Although, again, when word that a four-foot ordinance had been passed, there were a lot of dancers that left the club based on previous clubs and the effect that it had. The enforcement came in December of 1998 –

Q (By Mr. Tigue, continuing) So again –

A – at this club.

Q Okay. So the solid black line on exhibit –

A The solid black line is just when they set up the programming. The solid black line really distinguishes where it says December and then 1997, month, that's December of 1997. So that I do first a monthly comparison and then I've got a year-to-day, 1998 year-to-date, 1999.

MR. TIGUE: Okay. And, again, would you do the – well, first of all let me offer Exhibit 11.

MR. GHERTY: Same objection.

THE COURT: All right. It is received.

[140] Q (By Mr. Tigue, continuing) Okay. Again, would you go through the same analysis that you did on the last exhibit as to the difference in the financial performance before and after the enactment of the – well, not

the enactment of the ordinance but at least the implementation of the ordinance?

A Our Spokane club used to be a very profitable club for us. And in between enactment and enforcement I believe you'll see some legal fees that are high some months and that's where we were in court defending the action. But when the actual enforcement came in December, you'll find that my legal fees are down to nothing because the court case was over and the bills had been paid. And that's where I started sustaining losses in the club. In December of '98, I had a loss – again, putting back in consulting fees and depreciation – of about $9,000 where the same period a year ago – again, putting back in consulting and depreciation – at a profit of about $48,000 for the month. So a substantial swing.

Q And, again, directing – directing your attention to the following months. How is the club – what's been the club's performance in the months since?

A Well, using 1999 if you'll go to the very last page, January, I had a loss of $21,000; February, $24,600; [141] March, about $40,000; and April, about $38,000. I continue to slide in that club.

Q Mr. Bern, showing you what's been marked for identification is Exhibit 12. Do you recognize this document?

A Yes, this is the Deja Vu Tacoma club which is located in Lakewood; Washington. It is a new city, four and a half, Pierce County, and it is financial statements from 1997 to present – to May of 1999.

Q Okay. And again what is the significance of the solid black line between October and November of 1997?

A It really should be over on the December part. And that's to get a month-to-month comparison December of '97 versus December of '96 and then the next black line is to distinguish year-to-date.

Q Okay.

A When they set the program up it should have been over one.

Q Okay. So the program first became implemented in December of '97?

A This program here?

Q Yes.

A No.

Q I'm sorry. When did the – when did the –

A 1997 is before picture of how before –

[142] Q Okay. It is entirely before?

A Yes, the ordinance in city of Lakewood was enacted June 4th of 1998. We were notified towards the end of August, I believe, that they would start enforcement and – and then the real enforcement came in November – November – November or December of that same year.

Q Again, based upon this exhibit what was the result?

A Before the ordinance I was – the year before I average gross, weekly gross, of about $41,000 a week. In 1999, I'm real close, but I think my weekly average is about $9300 a week.

Q And is that reflected on which page?

A You can see the bottom line, 1999, on the very last page where I'm sustaining losses in the rough neighborhood of about $30,000 a month where in 1997 before the enactment of the ordinance it was probably about 70 to $80,000 profit per month. I'm going to change that to $60,000 profit per month.

Q And, again, directing your attention to Exhibit 13 -- did I offer 12, your Honor?

THE COURT: No, you haven't.

MR. TIGUE: All right. I will offer 12 if I haven't.

THE COURT: Any objection?

MR. GHERTY: Same objection.

[143] THE COURT: Same. Proceed.

Q (By Mr. Tigue, continuing) Again, I'm showing what has been marked for identification – is that of Exhibit 13?

A Yes.

Q All right. Exhibit 13. Would you describe what that document is?

A This is the yearly P & L comparisons for the Federal Way club, the Deja Vu – Federal Way, which is located in Federal Way, Washington.

Q And, again, is this fairly and accurately reflect – does it fairly and accurately reflect the financial health of the Federal Way Deja Vu club?

A Yes.

MR. TIGUE: And I would then offer Exhibit 13.

MR. GHERTY: Same objection.

THE COURT: Same. Received.

Q (By Mr. Tigue, continuing) Okay. Now, directing your attention to the first page of Exhibit 13. There's a yellow highlight on September. Is there a significance to the yellow highlight?

A That's when the ordinance, four-foot ordinance, went into effect. I believe it was September 16th or 18th.

Q Okay. And, again, going from September to October what [144] was the difference in your revenue?

A Well, the ordinance was really passed in the middle of the month. So the full month before the ordinance the club was probably averaging about a $150,000 gross per month. And after the ordinance in the first year, my grosses went down where I was averaging about 45 to 50,000 per month.

Q And, again, what effect did that have on the bottom line – is that –

A The Federal Way club is the club that I use in most of my declarations because this was the first Deja Vu club that I operated that went to the four-foot rule and I've got the most information. So what you have is from the effect of the four-foot rule from September of '95 through May of 1999.

Q And, again, could you describe the difference in revenue and profit before and after September and October of 1995?

A Well, if I use the month of May, in May of 1995 – again, putting consulting fees back in – I had a profit of a little under $50,000 for the month. The following year, 1996, in May, adding back in depreciation, I had a loss of about $23,000. Going to present day, May of 1999, again putting depreciation back in there, I've got a loss of about $19,000 for the [145] month.

Q And, again, directing your attention to the last page of the exhibit for 1998 under a operation operating the full year under the four-foot restriction, is it true then that the club lost $202,291?

A Yeah, you can put the consulting fees back in there so they lost $185,000, yes.

Q Okay. Now, other than the enactment of these ordinances containing distance requirements, has there been any change in the way the club operates that you might – you might attribute this reversal of fortune to?

A Just about all of the clubs we had a change in our operating hours. In the case of the Federal Way club before the ordinance I was closing at 2:30 seven days a week, and the new ordinance stipulated that I had to close at 2:00 so it was very minor. In the Tacoma/Spokane clubs and airport club, I used to close weekdays at 3:00, weekends at 4:00. And while the weekdays didn't make a great deal of difference, there was a little bit of revenue loss on the weekends from the 2:00 to 4:00 crowd. But we feel it wasn't enough to cause us to go from very profitable to the losses that we're showing.

Q Okay. And other than incorporating the distance [146] requirement and complying with the distance requirements, did you do anything else during this period of

time that would change your operation other than the distance and the hours?

A We had some lighting requirements that most cities really didn't change our operation that much. They've got it in the ordinance that addresses some lighting, but in most cases we try and highlight our stages and try for the theatrical look. And most municipalities have let us keep that same – same format of highlighting our stages, making the brightest lights on the stage.

Q Now, Exhibit 13 indicates that you've been operating the Federal Way club since 1995 despite losing over $100,000 a year?

A Uh-huh.

Q Is there a reason why you – how can you – how can you – how can you keep these clubs operating when you're losing this much money?

A Well, we're subsidizing the clubs with those that don't have a four-foot rule. And we – in the case of Federal Way, the first club, before the four-foot rule at Tacoma, which is in the same corporation, Tacoma club would pay for all of the Federal Way bills that they couldn't sustain. Now, that I've got loses [sic] at the [147] Federal Way club also we're going to outside loans from different corporations.

We feel very strongly that – that the Washington State supreme court, while they upheld the constitutionality of the four-foot rule, they also said unless the ultimate result is to force the dancers or the clubs out of business then it would be unconstitutional. We're trying to prove by keeping these clubs open that the four-foot rule does have

that effect of forcing us out of business. And we're compiling all kinds of data regarding dancers and number of customers and dances being bought and, of course, our revenues through the door so that hopefully we can get back to the court and prove our case.

Q Now, you testified that – that you maintain statistics on number of dancers and number of dances sold and those kinds of things. What impact has the – has this four-foot requirement had on the number of dancers who work at your Deja Vu clubs?

A Usually when the four-foot rule has been enacted, we have substantial loss of dancers because they can't make a living and they go to a club that doesn't have these restrictions so that they can make a living. It is a Catch-22. No dancers, no customers. No customers, no dancers. And when the Federal Way was [148] first enacted, we spent a number of hours out there, supervisors and myself, talking with dancers, taking with customers and basically the customers have told us –

MR.GHERTY: Objection. Hearsay.

THE COURT: Overruled.

Q (By Mr. Tigue, continuing) It is overruled. You may answer.

A Basically the customers have told us why should I pay 10 to $20 depending on the club for a dance that's four feet away when I can watch her on the stage six to eight feet away nude and it doesn't cost me a dime. So that personal dance is – has been lost in the four-foot clubs. And we – we don't even come close to selling the number of dances or the girls don't come close to selling the number

of dances. And when their income has gone down, they've left to go to greener pastures.

Q All right. Do you have any clubs in Washington that aren't subject to the four-foot rule?

A I've got one.

Q And where is that located?

A It is located in downtown Seattle.

Q And while all of these other clubs have operated at the severe financial losses, what's happened to the revenue [149] of your Seattle club?

A That's gone up yearly. My revenue, my profit, and number of dancers and number of customers have continued to go up every month.

Q Now, if you didn't have – well, let me ask you this, do you know how many Deja Vu clubs there are nationwide?

A I haven't counted for such a long time. I'm going to guess 45 to 50.

Q Okay. If you didn't have a chain of 45 to 50 clubs to subsidize these four clubs that you talked about, would you, as the management consultant, recommend they stay in business?

A No.

Q And why is that?

A Purpose of business is to make money. And I'm not making money in four of my clubs, five of my clubs.

Q Now, you've testified that in addition to managing the clubs that you managed, you have personally visited anywhere from 35 to 50 clubs, that you regularly read the trade publication, and that you regularly attend the annual convention and attend the seminars. And that last year most of the seminars were dealt – had to do with four-foot rule or its variation, is that correct?

[150] A Last two years, yes.

Q Last two years?

A Yes.

Q During all of that experience, are you aware of a single club in the United States of America where a four-foot rule or similar separation requirement has been strictly adhered to where the club has been able to operate profitably?

MR. GHERTY: Objection. Foundation and also relevancy.

THE COURT: I don't know about the relevance but there's no problem with the foundation. Overruled.

A Not to my knowledge.

Q (By Mr. Tigue, continuing) Okay. You're not aware of any?

A I'm not aware of any.

Q In the United States?

A No.

MR. TIGUE: I have no further questions.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. GHERTY:

Q The – Mr. Bern, is that of the 45 to 50 Deja Vu's you're only involved in nine or ten of those?

A Yes, nine.

EXHIBIT 9

CITY OF COATES
ORDINANCE NO. 36

AN ORDINANCE AMENDING THE CITY OF COATES CODE BY AMENDING CHAPTER V TO ADD PART 8 REGARDING THE LICENSING AND REGULATION OF SEXUALLY-ORIENTED BUSINESSES AND AMENDING SECTION 101.03 REGARDING LICENSING FEES.

The City Council of the City of Coates does ordain:

Section 1. The Coates City Code Chapter V is hereby amended to add the following:

Part 8; Sexually-Oriented Business Licensing

508.01 – PURPOSE.

The purpose of this provision of the Coates City Code is to prescribe licensing requirements for sexually-oriented businesses in order to protect the general health, safety and welfare.

508.02 – FINDINGS OF THE CITY COUNCIL.

The City Council of Coates makes the following findings regarding the need to license sexually-oriented businesses. The findings are based upon the experiences of other cities where such businesses have located, as previously studied by the City Council in adopting its Zoning Code provisions regulating the location of adult entertainment facilities.

A. Sexually-oriented businesses can contribute to an increase in criminal activity in the area in which such

businesses are located, taxing city crime-prevention programs and law enforcement services, as well as causing increased costs for prosecution services.

B. Sexually-oriented businesses can be used as fronts for prostitution and other criminal activity. The experience of other cities indicates that the proper management and operation of such businesses can, however, minimize this risk, provided the owners and operators of such facilities are regulated by licensing or other procedures.

C. Sexually-oriented businesses can increase the risk of exposure to communicable diseases including but not limited to Acquired Immune Deficiency Syndrome (AIDS) for which currently there is no cure. Experiences of other cities indicate that such businesses can facilitate the spread of communicable diseases by virtue of the design and use of the premises, thereby endangering not only the patrons of such establishments but also the general public.

D. Sexually-oriented businesses can cause or contribute to public health problems by the presence of live adult entertainment in conjunction with food and/or drink on the same premises.

E. The risk of criminal activity and/or public health problems can be minimized through a licensing and regulatory scheme as prescribed herein.

508.03 – CONCLUSIONS OF THE CITY COUNCIL.

In direct furtherance of the substantial goals of public health, safety, and welfare, the City Council adopts the following licensing regulations, recognizing that it has a great interest in the promotion of health and the prevention

of criminal activity. It is not the intent of this Section to inhibit the freedom of speech component of sexually-oriented businesses; instead this Section represents a balancing of competing interests: reduced criminal activity through the regulation of sexually-oriented businesses versus the protected rights of participants in sexually-oriented businesses and their patrons. Thus, this Section is designated to alleviate undesirable social problems that accompany sexually-oriented businesses without curtailing the constitutionally protected expression.

508.04 – DEFINITIONS.

A. "Adult Body Painting Studio," "Adult Book Store," "Adult Companionship Establishment," "Adult Entertainment Facility," "Adult Mini Motion Picture Theater," "Adult Modeling Studio," "Adult Motion Picture Theater," "Adult Sauna," "Sexually-Oriented Business," "Specified Anatomical Areas" and "Specified Sexual Activities" are defined in Coates City Ordinance 21 and in Coates Zoning Ordinance, Article VIII, as amended.

B. Booths, Stalls, or Partitioned Portions of a Room or Individual Room –

(1) Enclosures specifically offered to persons for a fee or as an incident to performing high-risk sexual conduct; or

(2) Enclosures which are part of a business operated on the premises which offers movies or other entertainment to be viewed within the enclosure, including enclosures wherein movies or other entertainment is dispensed for a fee.

The phrase "booths, stalls, or partitioned portions of a room or individual rooms" does not mean enclosures which are private offices used by the owners, managers, or persons employed by the premises for attending to the tasks of their employment, and which are not held out to the public or members of the establishment for hire or for a fee or for the purpose of viewing movies or other entertainment for a fee, and are not open to any persons other than employees.

C. City – City of Coates

D. Clean – the absence of dirt, grease, rubbish, garbage, semen, bodily excretions, and other offensive, unsightly, or extraneous matter.

E. Doors, Curtains or Portal Partitions – full, complete, nontransparent closure devices through which one cannot see or view activity taking place within the enclosure.

F. Fondle or Caress – an affectionate touching, rubbing or stroking with the intent to sexually arouse or excite.

G. Good Repair – free of corrosion, breaks, cracks, chips, pitting, excessive wear and tear, leaks, obstructions, and similar defects so as to constitute a good and sound condition.

H. Health Inspectors – inspectors employed by the County of Dakota or their agents.

I. Licensed Facility – Any premises requiring a license under this Section.

J. Minor – any natural person under the age of eighteen (18) years.

K. Nudity – the showing of the human male or female genitals or pubic area with less than fully opaque covering; the showing of the female breast with less than a fully opaque covering below a point immediately above the top of the areola; or the depiction or showing of the covered male genitals in a discernibly turgid state.

L. Open to an Adjacent Public Room so That The Area Inside is Visible to Persons in the Adjacent Public Room – either the absence of any entire "door, curtain or portal partition" or a door or other device which is made of clear, transparent material such as a glass, plexi-glass or other similar material meeting building code and safety standards, which permits the activity inside the enclosure to be entirely viewed or seen by persons outside the enclosure.

M. Patron – A customer of a licensed facility.

N. Person – one or more natural persons; a partnerships [sic], including a limited partnership; a corporation, including a foreign, domestic, or nonprofit corporation; a trust; a political subdivision of the State; or any other business organization.

508.05 – LICENSE REQUIRED.

No person shall own or operate a sexually-oriented business within the City unless such person is currently licensed under this Part.

508.06 – LICENSE APPLICATION.

The application for a license under this Part shall be made on a form supplied by the City Clerk and shall request the following information:

A. For all applicants:

(1) Whether the applicant is a natural person, corporation, partnership, or other form of organization.

(2) The legal description of the premises to be licensed, along with a floor plan of the premises. The floor plan of the premises shall detail all internal operations and activities, including a statement of the total floor space occupied by the business. The floor plan need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches.

(3) The name and street address of the business. If the business is to be conducted under a designation, name, or style other than the name of the applicant, a certified copy of the certificate required by Minn. Stat. §333.01 shall be submitted.

B. If the applicant is a natural person:

(1) The name, place and date of birth, street and city address, and phone number of the applicant.

(2) Whether the applicant has ever used or has been known by a name other than the applicant's name, and if so, the name or names used and information concerning dates and places where used.

(3) The street and city addresses at which the applicant has lived during the preceding two (2) years.

(4) The type, name and location of every business or occupation in which the applicant has been engaged during the preceding two (2) years and the name(s) and address(es) of the applicant's employer(s) and partner(s), if any, for the preceding two (2) years.

(5) Whether the applicant has ever been convicted of a felony, crime, or violation of any ordinance other than a petty misdemeanor traffic ordinance. If so, the applicant shall furnish information as to the time, place, and offense for which convictions were made.

C. If the applicant is a partnership:

(1) The name(s) and address(es) of all general partners and all of the information concerning each general partner that is required of applicants in subpart B of this Section.

(2) The name(s) of the managing partner(s) and the interest of each partner in the business.

(3) A true copy of the partnership agreement shall be submitted with the application. If the partnership is required to file a certificate as to a trade name pursuant to Minn. Stat. §333.01, a certified copy of such certificate shall be attached to the application.

D. If the applicant is a corporation or other organization:

(1) The name of the corporation or business form, and if incorporated, the state of incorporation.

(2) A true copy of the Certificate of Incorporation, Articles of Incorporation or Association Agreement, and By-laws shall be attached to the application. If the

applicant is a foreign corporation, a Certificate of Authority as required by Minn. Stat. §303.06, shall be attached.

(3) The name of the manager(s), proprietor(s), or other agent(s) in charge of the business and all of the information concerning each manager, proprietor, or agent that is required of applicants in subpart B of this Section.

508.07 – APPLICATION EXECUTION AND VERIFICATION.

A. If the application is that of a natural person, the application shall be signed and sworn to by that person; if of a corporation, by an officer thereof; if of a partnership, by one of the general partners; if of an unincorporated association, by the manager or managing officer thereof.

B. Applications for licenses under this Article shall be submitted to the City Clerk. Within twenty (20) calendar days of receipt of a completed application and payment of all licensing application fees, the City Clerk or designee shall verify any and all of the information requested of the applicant in the application including the ordering of criminal background checks, and conduct any necessary investigation to assure compliance with this Part.

508.08 – APPLICATION CONSIDERATION.

No later than fifteen (15) calendar days after the completion of the license application verification and investigation by the City Clerk, as prescribed in 508.07, the City Clerk shall accept or deny the license application in accordance with this Part. If the application is denied, the City Clerk shall notify the applicant of the determination in writing. The notice shall be mailed by certified and

regular mail to the applicant at the address provided on the application form and it shall inform the applicant of the applicant's right, within twenty (20) calendar days of receipt of the notice by the applicant, to request an appeal of the City Clerk's determination to the City Council or to immediately challenge the determination in a court of law. If an appeal to the City Council is timely received by the City Clerk, the hearing before the City Council shall take place within twenty (20) calendar days of the receipt of the appeal by the City Clerk. If an application is granted for a location where a building is under construction or not ready for occupancy, the license shall not be delivered to the licensee until a certificate of occupancy has been issued for the licensed premises. During the application consideration process prescribed herein, an applicant operating a business not previously subject to the license provisions of this Part may remain operating pending the outcome of the application consideration.

508.09 – FEES.

A. Application Fee.

(1) The license application fee shall be as set forth in Section 101.03.

(2) The license application fee shall be paid in full before the application for a license is accepted. All fees shall be paid to the City Clerk for deposit into the general fund of the City. Upon rejection of any application for a license or upon withdrawal of application before approval by the City Clerk the license fee shall be refunded to the applicant.

(3) When the license is for premises where the building is not ready for occupancy, the time fixed for computation of the license fee for the initial license period shall be ninety (90) days after approval of the license by the issuing authority or upon the date an occupancy permit is issued for the building.

B. Investigation Fee. An applicant for any license under this Part shall deposit with the issuing authority, at the time an application is submitted, an investigation fee as set forth in Section 101.03 to cover the costs involved in verifying the license application and to cover the expense of an investigation needed to assure compliance with this Division. The investigation fee shall be nonrefundable.

508.10 – PERSONS AND LOCATIONS INELIGIBLE FOR A LICENSE.

The City Clerk shall issue a license under this Part to an applicant unless one (1) or more of the following conditions exist:

(1) The applicant is a minor at the time the application is submitted;

(2) The applicant failed to supply all of the information requested on the license application;

(3) The applicant gave false, fraudulent, or untruthful information on the license application;

(4) The applicant has had a sexually-oriented license revoked within a one (1) year period immediately preceding the date the application was submitted;

(5) The applicant has had a conviction of a felony or a gross misdemeanor or misdemeanor relating to

sex offenses, obscenity offenses, or adult uses in the past five (5) years;

(6) The sexually-oriented business does not meet all of the zoning requirements prescribed in the City of Coates Zoning Code. This provision shall not apply to a business existing at the time this Part and ordinance is enacted which is not yet required to comply with the Coates Zoning Code;

(7) The premises to be licensed as a sexually-oriented business is currently licensed by the City as a tanning facility, tattoo establishment, pawnshop, therapeutic massage enterprise, or an establishment licensed to sell alcoholic beverages;

(8) The applicant has not paid the license and investigation fees required.

508.11 – RENEWAL APPLICATION.

A. All licenses issued under this Part shall be effective for only one (1) year commencing with the date of approval by the City Clerk or City Council. An application for the renewal of an existing license shall be submitted to the City Clerk at least thirty (30) calendar days prior to the expiration date of the existing license.

B. Within twenty (20) calendar days of receipt by the City Clerk of a fully completed renewal application, the City Clerk or designee shall verify any and all of the information requested of the applicant in the renewal application, including the ordering of criminal background checks, and shall conduct any necessary investigation to assure compliance with this Part. No later than fifteen

(15) calendar days after the completion of the renewal application verification and investigation by the City Clerk or designee, as prescribed herein, the City Clerk shall issue a renewal license unless one (1) or more of the following conditions exist:

(1) The applicant is a minor at the time the application is submitted;

(2) The applicant failed to supply all of the information requested on the renewal application;

(3) The applicant gave false, fraudulent, or untruthful information on the renewal application;

(4) The sexually-oriented business was found in the immediately preceding license year to have violated the license restrictions prescribed in this Part;

(5) The sexually-oriented business does not meet the zoning requirements prescribed in the Coates Zoning Code;

(6) The premises licensed as a sexually-oriented business is currently licensed by the City as a tanning facility, tattoo establishment, pawnshop, therapeutic massage enterprise, or an establishment licensed to sell alcoholic beverages;

(7) The applicant has had a conviction of any crime listed in Section 508.10 (5) of this Part; or

(8) The applicant has had a sexually-oriented license revoked within a one (1) year period immediately preceding the date of [sic] the application was submitted.

C. If the City Clerk denies a renewal application, the City Clerk shall notify the applicant in accordance with

this Part and the notice shall, in addition, state the grounds for denial.

D. After the denial of a renewal application by the City Clerk, the applicant may appeal the City Clerk's determination to the City Council in accordance with Section 508.08 of this Part or by immediately challenging the determination in a court of law. If the City denies renewal of a license under this Part, the applicant shall not be issued a license under this Part for one (1) year from the date of denial. If, subsequent to the denial, the City finds that the basis for the denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least ninety (90) days have elapsed since the date the denial became final.

508.12 - GENERAL LICENSE RESTRICTIONS.

A. Posting of License. A license issued under this Part must be posted in a conspicuous place in the premises for which it is used.

B. Effect of License. A license issued under this Part is only effective for the compact and contiguous space specified in the approved license application.

C. Maintenance of Order. A licensee under this Part shall be responsible for the conduct of the business being operated and shall not allow any illegal activity to take place on or near the licensed premises, including but not limited to prostitution, public indecency, indecent exposure, disorderly conduct, or the sale or use of illegal drugs. Every act or omission by an employee or independent contractor of the licensee constituting a violation of this Part shall be deemed the act or omission of the licensee if

such act or omission occurs either with the authorization, knowledge, or approval of the licensee, or as a result of the licensee's negligent failure to supervise the employee's or independent contractor's conduct.

D. Special Requirements for Live Adult Entertainment.

(1) All performers, dancers, and persons providing live entertainment distinguished or characterized by an emphasis on matters depicting, describing, or relating to specified sexual activities or specified anatomical areas in the licensed facility or in areas adjoining the licensed facility where entertainment can be seen by patrons, customers or spectators shall:

(a) provide social entertainment on a platform intended for that purpose which is raised at least two feet from the level of the floor;

(b) provide said entertainment at a distance no closer than six (6) feet to any patron;

(c) not fondle or caress any patron;

(d) Not solicit any pay or gratuity from any patron.

(2) No patron, customer or spectator of a licensed facility providing live entertainment distinguished or characterized by an emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical areas shall:

(a) fondle or caress any performer, dancer or other person, providing live entertainment;

(b) directly pay or give any gratuity to any performer, dancer or other person providing live entertainment.

508.13 – RESTRICTIONS REGARDING LICENSE TRANSFER.

A. A license granted under this Part is for the person and the premises named on the approved license application. No transfer of a license shall be permitted from place to place or from person to person without complying with the requirements of an original application.

B. When a sexually-oriented business licensed under this Part is sold or transferred, the existing licensee shall immediately notify the City Clerk of the sale or transfer. If the new owner or operator is to continue operating the sexually-oriented business, the owner or operator must immediately apply for a license under this Part.

508.14 – RESTRICTIONS REGARDING HOURS OF OPERATION.

A licensee shall not be open for business to the public during the following hours:

Not open before 5:30 a.m. nor after 1:00 a.m.

508.15 – RESTRICTIONS REGARDING MINORS.

No licensee shall allow minors to enter the licensed premises. The licensee shall request proof of age of all persons the licensee believes to be under the age of eighteen (18) years. Proof of age may be established only by: a valid driver's license or identification card issued by

Minnesota, another state; or a province of Canada, and including the photograph and date of birth of the licensed person; a valid military identification card issued by the United States Department of Defense; or in the case of a foreign national from a nation other than Canada, a valid passport.

508.16 – RESTRICTIONS REGARDING SANITATION AND HEALTH.

A. Partitions Facilitating Sexual Activity. A licensee under this Part shall not allow any partition between a subdivision, portion, or part of the licensed premises having any aperture which is designed or constructed to facilitate sexual intercourse, sodomy, or fondling or other erotic touching of human genitals, pubic region or pubic hair, buttocks, or female breast between persons on either side of the partition.

B. Restrictions on Booths, Stalls, and Partitions. A licensee under this Part shall not allow or have on the licensed premises or adjoining areas any booths, stalls, or partitions used for the viewing of motion pictures or other forms of entertainment that have doors, curtains, or portal partitions, unless such booths, stalls, or partitions have at least one side open to an adjacent public room so that the area inside is visible to persons in the adjacent public room. Such areas shall be lighted in a manner that the persons in the area used for viewing motion pictures or other forms of entertainment are visible from the adjacent public rooms. Seating or reclining surfaces inside any booths, stalls, or partitions used for the viewing of motion pictures or other forms of entertainment including but not limited to live entertainment shall be prohibited.

C. Authority of Health Inspectors. The Dakota County Health Inspectors shall have the authority to inspect or cause to be inspected the licensed premises and adjoining areas in order to ascertain the source of infection or reduce the spread of communicable diseases. Such officials shall have the authority to issue appropriate orders to the licensee regarding health and sanitation.

D. Limitation on Number of Persons in Partitioned Areas. Any booths, stalls, or partitioned portions of a room or individual rooms used for the viewing of motion pictures or other forms of entertainment including but not limited to live entertainment shall not be occupied by more than one (1) person at a time.

E. General Sanitation Requirements. All sexually-oriented business [sic] shall at all times be kept clean as defined herein and in a state of good repair as defined herein.

F. Duty to Supervise. The licensee shall not permit specified sexual activities as defined herein to take place on the premises and shall have an affirmative duty to supervise the licensed premises and prevent such activities.

508.17 – CIVIL SANCTIONS FOR LICENSE VIOLATIONS.

A. Suspension. The City Council may suspend a license issued pursuant to this Part for up to sixty (60) days if the City Council determines that a licensee has violated the following:

(1) Fraud, misrepresentation, or false statement contained in a license application or a renewal application.

(2) Fraud, misrepresentation, or false statement made in the course of carrying on the licensed occupation or business.

(3) Any violation of this Part or state law.

(4) A licensee's criminal conviction that is directly related to the occupation or business licensed as defined by Minnesota Statutes, Section 364.03, Subd. 2, provided that the licensee cannot show competent evidence of sufficient rehabilitation and present fitness to perform the duties of the licensed occupation or business as defined by Minnesota Statutes, Section 364.03, Subd. 3.

(5) Conducting the licensed business or occupation in an unlawful manner or in such a manner as to constitute a breach of the peace or to constitute a menace to the health, safety, or general welfare of the community.

B. Revocation. The City Council may revoke a license if the City Council determines that:

(1) the licensee's license was suspended in the preceding fourteen (14) months and an additional cause for suspension as detailed in (A) above is found by the City Council to have occurred within the fourteen (14) month period;

(2) the licensee gave false or misleading information in the material submitted to the City during the application process;

(3) a licensee or an employee or independent contractor of the licensee has knowingly allowed possession, use, or sale of controlled substances on the premises;

(4) a licensee or an employee or independent contractor has knowingly allowed prostitution on the premises;

(5) a licensee violated any of the provisions of Minnesota Statutes Section 617.241-617.299 relating to the illegal distribution, possession, or sale of obscene materials;

(6) a licensee or an employee knowingly operated the sexually-oriented business during a period of time when the licensee's license was suspended.

(7) a licensee has been convicted of an offense listed in Section 508.10 (5) of this Part for which the time period required has not elapsed;

(8) on two or more occasions within a 12-month period, a person or persons committed an offense occurring in or on the licensed premises of a crime listed in Section 508.10 (5) of this Part for which a conviction has been obtained, and the person or persons were employees or independent contractors of the licensee at the time the offenses were committed;

(9) a licensee or an employee or independent contractor of the licensee has knowingly allowed specific sexual activities to occur in or on the licensed premises, or

(10) a licensee is delinquent in payment to the City, County, State or Federal Governments for hotel occupancy taxes, ad valorem taxes, sales taxes, or other government imposed financial obligations.

C. Hearing Procedures. A revocation or suspension shall be preceded by written notice to the licensee and a public hearing. The notice shall give at least eight (8) days

notice of the time and place of the public hearing and shall state the nature of the charges against the licensee. The notice shall be mailed to the licensee at the most recent address listed on the application.

508.18 – CRIMINAL PENALTY.

A violation of this article shall be a misdemeanor under Minnesota law.

508.19 – SEVERABILITY.

If any section, subsection, sentence, clause or phrase of this Part is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of this Part. The City Council hereby declares that it would have adopted the Part and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

Section 2. The Coates City Code, Section 101.03 is hereby amended to add the following:

Description	Required By	Fee
Sexually-oriented Business License	508.09	$2,000.00
Sexually-oriented Business Investigation Fee	508.09	$ 500.00

Section 3. Summary approved. The City Council hereby determines that the text of the summary marked "Official Summary of Ordinance No. **36**", a copy of which is attached hereto clearly informs the public of the intent and

effect of the ordinance. The City Council further determines that publication of the title and such summary will clearly inform the public of the intent and effect of the ordinance.

Section 4. Filing. The City Clerk shall file a copy of this ordinance in his/her office, which copy shall be available for inspection by any persons during regular office hours.

Section 5. Publication. The City Clerk shall publish the title of this ordinance and the official summary in the official newspaper of the City with notice that a printed copy of the ordinance is available for inspection by any person during regular office hours at the Office of the City Clerk.

Section 6. Effective Date. This ordinance shall take effect December 31, 1999, following the publication of its title and the official summary.

PASSED this 13th day of December, 1999.

/s/ John T. Gores
John T. Gores. Mayor

ATTEST:

/s/ Marjorie Karnick
Marjorie Karnick, City Clerk

EXHIBIT 10

CITY OF COATES
ORDINANCE NO. 39

AN ORDINANCE OF THE CITY OF COATES, MINNESOTA, AMENDING, FOR PURPOSES OF CLARIFICATION, SECTIONS 509.04, 509.08, 509.11 and 509.17 OF THE COATES CITY CODE REGULATING AND LICENSING SEXUALLY-ORIENTED BUSINESSES.

The City Council of the City of Coates does ordain:

Section 1. The Coates City Code, Section 509.04 (A), is amended to read as follows:

509.04 – DEFINITIONS.

A. "Adult Body Painting Studio," "Adult Book Store," "Adult Companionship Establishment," "Adult Entertainment Facility," "Adult Mini Motion Picture Theater," "Adult Modeling Studio," "Adult Motion Picture Theater," "Adult Sauna," "Sexually-Oriented Business," "Specified Anatomical Areas" and "Specified Sexual Activities" are defined ~~in Coates City Ordinance 21 and~~ in Coates Zoning Ordinance, Article VIII, as amended.

Section 2. The Coates City Code, Section 509.08, is amended to read as follows:

509.08 – APPLICATION CONSIDERATION. No later than fifteen (15) calendar days after the completion of the license application verification and investigation by the City Clerk, as prescribed in ~~508.07~~ *509.07*, the City Clerk shall accept or deny the license application in accordance with this Part. If the application is denied, the City Clerk shall notify the applicant of the determination in writing. The notice shall be mailed by certified or

regular mail to the applicant at the address provided on the application form and it shall inform the applicant of the applicant's right, within twenty (20) calendar days of receipt of the notice by the applicant, to request an appeal of the City Clerk's determination to the City Council or to immediately challenge the determination in a court of law. If an appeal to the City Council is timely received by the City Clerk, the hearing before the City Council shall take place within twenty (20) calendar days of the *City Clerk's* receipt of the *request for* appeal ~~by the City Clerk~~. If an application is granted for a location where a building is under construction or not ready for occupancy, the license shall not be ~~delivered~~ *issued* to the licensee until a certificate of occupancy has been issued for the licensed premises. During the application consideration process prescribed herein, an applicant operating a business not previously subject to the license ~~provisions~~ *requirement* of this Part may remain operating pending the outcome of the application consideration *including appeals to the City Council or final outcome of an appeal to a court of law.*

Section 3. The Coates City Code, Section 509.11 B(7) and D, are amended to read as follows:

* * *

(7) The applicant has had a conviction of any crime listed in Section ~~508.10(5)~~ *509.10(5)* of this Part; or

* * *

D. After the dènial of a renewal application by the City Clerk, the applicant may appeal the City Clerk's determination to the City Council in accordance with Section ~~508.08~~ *509.08* of this Part or by immediately

challenging the determination in a court of law. If the City denies renewal of a license under this Part, the applicant shall not be issued a license under this Part for one (1) year from the date of denial. If, subsequent to the denial, the City finds that the basis for the denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least ninety (90) days have elapsed since the date the denial became final.

Section 4. The Coates City Code, Section 509 17 B(7) and (8), are amended to read as follows.

* * *

(7) a licensee has been convicted of an offense listed in Section ~~508.10 (5)~~ *509.10 (5)* of this Part for which the time period required has not elapsed.

(8) on two or more occasions within a 12-month period, a person or persons committed an offense occurring in or on the licensed premises of a crime listed in Section ~~508.10 (5)~~ *509.10 (5)* of this Part for which a conviction has been obtained, and the person or persons were employees or independent contractors of the licensee at the time the offenses were committed;

* * *

Section 5. Filing. The City Clerk shall file a copy of this ordinance in her office, which copy shall be available for inspection by any person(s) during regular office hours.

Section 6. Publication. The City shall publish the title of this ordinance and the ordinance in the official newspaper of the City with notice that a printed copy of the ordinance is available for inspection by any person during regular office hours at the Office of the City Clerk.

Section 7. Effective Date. This ordinance shall take effect upon its passage and publication.

PASSED this 8th day of May, 2000.

/s/ John T. Gores
John T. Gores, Mayor

ATTEST:

/s/ Marjorie Karnick
Marjorie Karnick, City Clerk

EXHIBIT 11

ORDINANCE NO. 40
COATES ZONING ORDINANCE

AN ORDINANCE ADOPTING AND RE-ENACTING SECTION 522 REGULATING THE LOCATION OF SEXUALLY-ORIENTED BUSINESSES, AMENDING ARTICLE VIII BY ADDING AND AMENDING DEFINITIONS RELATING TO SEXUALLY-ORIENTED BUSINESSES.

The City Council of the City of Coates does ordain:

Section 1. Ordinances 21, 26, 30 and 32 are hereby deleted and replaced as set forth in Sections 2 through 6 below.

Section 2. The City of Coates Zoning Ordinance Article V is hereby amended to add the following:

Section 522. Sexually-Oriented Businesses.

A. Purpose.

The purpose of this Section of the City of Coates Zoning Ordinance is to control, through zoning regulations, certain land uses that have a direct and detrimental effect on the character of the City's residential and commercial neighborhoods.

B. Findings of the City Council.

The City Council of the City of Coates makes the following findings regarding the effect sexually-oriented businesses have on the character of the City. The findings are based on the City Council's study of experiences of

other urban areas in the nation where sexually-oriented businesses were located.

(a) Sexually-oriented businesses can exert a dehumanizing influence on persons attending places of worship; children attending state-licensed family day care homes, state-licensed group family day care homes, and state-licensed child care centers, and people using parks.

(b) Sexually-oriented businesses can contribute to an increase in criminal activity in the area in which such businesses are located, taxing local law-enforcement services.

(c) Sexually-oriented businesses can significantly contribute to the deterioration of residential neighborhoods and can impair the value of the residential housing in the area in which such businesses are located.

(d) The concentration of sexually-oriented businesses in one area can have a substantially detrimental effect on the area in which such businesses are concentrated and on the overall quality of urban life. A cycle of decay can result from the influx and concentration of sexually-oriented businesses. The presence of such businesses is perceived by others as an indication that the area is deteriorating and the result can be devastating as other businesses and residents move out of the vicinity. Declining real estate values, which can result from the concentration of such businesses, erode the City's tax base.

C. Conclusions of the City Council.

In order to minimize the detrimental effect sexually-oriented businesses have on adjacent land uses, the City Council adopts the following land-use regulations,

recognizing that it has a great interest in the present and future character of the City's residential and commercial neighborhoods.

D. Zoning Regulations.

(a) Sexually-oriented businesses shall be prohibited in all of the City's use districts detailed in Article II of the City of Coates Zoning Ordinance, except District AG, where such businesses shall be a permitted use subject to the conditions in (b) below and the requirements of Section 710 of the City Coates Zoning Ordinance.

(b) Sexually-oriented business shall be a permitted use subject to the following conditions:

(1) No sexually-oriented business shall be located closer than 750 feet from any other sexually-oriented business or liquor-serving establishments. Only one sexually-oriented business shall be permitted per building or structure. Measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest point of the actual business premises of the sexually-oriented business to the nearest point of the actual business premises of any other sexually-oriented business.

(2) No sexually-oriented business shall be located closer than 750 feet from any single-family or multi-family dwelling, place of worship, school, public park, state-licensed family day care home, state-licensed group family day care home, or state-licensed child care center. Measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest point of the actual business

premises of the sexually-oriented business to the nearest point of the actual premises used as a single-family dwelling, place of worship, school or park, or state-licensed family day care home, state-licensed child care center. In the case of a single-family or multi-family dwelling located in an area used for agricultural purposes, the premises of the residence thereon shall be defined as the minimum lot size required by the City of Coates, Zoning Ordinance.

(3) No sexually-oriented business shall locate in any place which is also used to dispense or consume alcohol.

(4) No sexually-oriented business shall be located in the same building or upon the same property as another such use.

(5) Notwithstanding any other provision of this Code, a sexually-oriented business shall not be permitted more than one (1) on-premise sign advertising its business. Such on-premise sign shall comply with the requirements of Section 519 of the City of Coates Zoning Ordinance. Further, no sign shall contain any flashing lights, moving elements, or mechanically changing messages.

E. Penalty

A violation of this Article shall be a misdemeanor under Minnesota law.

F. Severability.

If any subsection, sentence, clause or phrase of this Section is for any reason held to be invalid, such decision

shall not affect the validity of the remaining portions of this Section. The Council hereby declares that it would have adopted this Section and each subsection, sentence, clause or phrases thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

G. Nonconforming Sexually-Oriented Business.

Sexually-oriented businesses which are classified as legal nonconforming uses may continue in accordance with the provision of this Section, except that any such nonconforming use shall be terminated and become illegal on and after January 31, 2001. To the extent possible, the City shall attempt to identify all such uses which become classified as nonconforming under the provision so [sic] this Section and shall notify the property owners and operators of such uses in writing of the change in status and the terms and conditions which apply. The owner of any property on which an adult use is located may apply to the Council for an extension of the termination date. Any such application shall be in writing and be received by the City no later than September 1, 2000. Failure to submit a timely extension application shall constitute a waiver of the right to request an exception. The applicant shall have the burden of proof to demonstrate the amortization period is an unreasonable burden upon the business and does not allow adequate time to recover a reasonable return upon the business investment and also the time required for an extension. In making its decision, the Council may consider any factor relevant to the issue, including but not limited to:

(a) The degree or magnitude of threat to the public health, safety and general welfare posed by the secondary impacts of the operation.

(b) The length of time that the adult use has been operating.

(c) The ease by which the property could be converted to a conforming use.

(d) The nature and character of the surrounding neighborhood.

(e) The value and condition of the improvements on the property.

(f) The amount of the applicant's investment in the business.

(g) The amount of investment already realized.

Section 3. The City of Coates Zoning Ordinance Article VIII, Section 801 shall be amended to add the following definitions:

(55) Adult Body Painting Studio – an establishment or business which provides the service of applying paint or other substance, whether transparent or non-transparent, to or on the body of a patron when such body is wholly or partially nude in terms of specified anatomical areas as defined herein.

(56) Adult Book Store – a building or part of a building used for the barter, rental or sale of a significant portion of items consisting of (1) instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities", or "specified anatomical areas" or (2) printed matter, picture film, or CD Roms or another form of recording if such items are distinguished

or characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas." "Significant portion of items" shall mean more than fifteen (15) percent of usable floor area or more than one hundred and fifty (150) square feet of floor area used for the display and barter, rental or sales of such items. No obscene work shall be allowed.

(57) Adult Companionship Establishment – a companionship establishment which excludes minors by reason of age, or which provides the service for a fee of engaging in or listening to conversation, talk or discussion between an employee of the establishment and a customer, if such service is distinguished or characterized by an emphasis on specified sexual activities or specified anatomical areas as defined herein.

(58) Adult Entertainment Facility – a building or space wherein an admission is charged for entrance or food or nonalcoholic beverages are sold or intended for consumption and wherein may be observed live presentation or entertainment distinguished or characterized by an emphasis on matters depicting, describing, or relating to specified sexual activities or specified anatomical areas as defined herein.

(59) Adult Mini Motion Picture Theater – a building or space with a capacity for fewer than 50 persons used for presenting material distinguished or characterized by an emphasis on matters, depicting, describing, or relating to specified sexual activities or specified anatomical areas as herein defined, for observation by patrons therein. The phrase "used for" in this definition shall mean a regular and substantial course of conduct and not a one-time presentation of such material.

(60) Adult Modeling Studio – an establishment whose major business is the provision to customers, of figure models who are so provided with the intent of providing sexual stimulation or sexual gratification to such customers and who engage in specified sexual activities as defined herein or display specified anatomical areas as defined herein while being observed, painted, painted upon, sketched, drawn, sculptured, photographed, or otherwise depicted by such customers.

(61) Adult Motion Picture Theater – a building or space with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matters depicting, describing, or relating to Specified Sexual Activities or Specified Anatomical Areas as herein defined, for observation by patrons therein. The phrase "used for" in this definition shall mean a regular and substantial course of conduct and not a one-time presentation of such material.

(62) Adult Sauna – a sauna which excludes minors by reason of age, or which provides a steam bath or heat bathing room used for the purpose of bathing, relaxation, or reducing, utilizing steam or hot air as a cleaning, relaxing or reducing agent, if the service provided by the sauna is distinguished or characterized by an emphasis on specified sexual activities or specified anatomical areas as defined herein.

(63) Place of Worship – a building or space that is principally used as a place where people of the same faith or religion regularly assemble for worship.

(64) State-Licensed Family Day Care Home; State-Licensed Group Family Day Care Home; State-Licensed Child Care Center – a facility holding a license from the

State of Minnesota pursuant to Minnesota Statutes, Chapter 245A and/or Minnesota Rules, Chapter 9502 or Chapter 9503, as amended.

(65) Sexually-Oriented Business – an adult book store, adult body painting studio, adult companionship establishment, adult motion picture theater, adult entertainment facility, adult modeling studio, adult mini motion picture theater, or adult sauna as herein defined.

(66) Specified Sexual Activities – include the following:

(a) Human genitals in a discernible state of sexual stimulation or arousal; or

(b) Acts or human masturbation, sexual intercourse, sodomy; or

(c) Fondling or other erotic touching of human genitals, pubic region or pubic hair, buttocks, or female breast or breasts; or

(d) Any combination of the foregoing.

(67) Specified Anatomical Areas –

(a) Less than completely and opaquely covered;

(1) human genitals, pubic region or pubic hair; or

(2) buttocks; or

(3) female breast or breasts below a point immediately above the tope of the areola; or

(4) any combination of the foregoing.

(b) Human male genitals in a discernibly turgid state even if completely and opaquely covered

Section 4. City of Coates Zoning Ordinance Article VIII, Section 801 shall be amended to revise the following definitions to read as follows

* * *

(39) Recreation, Commercial – A privately owned business offering recreational facilities, services, or equipment for a fee, including but not limited to private golf courses, theaters, bowling alleys, boat launches, etc. Sexually-oriented businesses are specifically excluded from this definition

* * *

(41) Retail, Commercial Use – Any use of land and incidental structures used for the display and sale of goods and services including eating and drinking establishments. Sexually-oriented business are specifically excluded from this definition.

* * *

Section 5. City of Coates Zoning Ordinance Article II, Section 201.D shall be amended to read as follows:

Section 201: District AG: Agriculture

D. Conditional Uses:

(a) Home Occupations

(b) Agricultural Service Establishments

(c) Utility Buildings and Structures

(d) Institutional Uses

(e) Greenhouses

(f) Commercial Recreation

(g) Mining and Extraction Operations

(h) Equipment Storage and Maintenance

(i) Mobile Homes

~~(j) Sexually-oriented Businesses~~

Section 6. City of Coates Zoning Ordinance Article II, Section 201.B is hereby amended to read as follows:

Section 201. District Ag Agriculture

B. Permitted Uses

(a) Agricultural Uses, including livestock (See Section 515)

(b) Single Family Dwellings

(c) Forestries and Nurseries

(d) Historic Sites

(e) Public Recreation

(f) Sexually-oriented businesses, as regulated by Section 522 of this Ordinance and subject to compliance with State of Minnesota Rules Part 7080 governing the design and installation of septic systems, and compliance with other applicable public health and safety regulations.

Section 7. Filing. The City Clerk shall file a copy of this ordinance in her office, which copy shall be available for inspection by any person(s) during regular office hours.

Section 8. Publication. The City shall publish the title of this ordinance and the ordinance in the official newspaper of the City with notice that a printed copy of the ordinance is available for inspection by any person during regular office hours at the Office of the City Clerk.

Section 9. Effective Date. This ordinance shall take effect upon its passage and publication.

PASSED this 10th day of July, 2000.

/s/ John T. Gores
John T. Gores, Mayor

ATTEST:

/s/ Marjorie Karnick
Marjorie Karnick, City Clerk

EXHIBIT 16

MEMORANDUM

TO: Coates City Council

FROM: Michael E. Molenda, City Attorney

RE: The Effect of Adult Oriented Businesses on Crime and Prosecution Costs in the City of Coates

DATE: October 29, 1999

Coates is a community of 182 persons located south of St. Paul with State Highway 52 running through it. The City of Coates has several businesses, including one adult oriented business, Jakes, a business featuring adult entertainment located within its boundaries.

In 1994, the Coates City Council enacted amendments to its Zoning Code, in Ordinance 21, by adding Section 522 to the Coates Zoning Ordinance and amending Section 201 and 801 of the Coates City Code. Section 522 was amended in 1995 to increase the amount of land available for usage by adult businesses by the passage of Ordinance 26. Ordinance 30 was passed in 1997 to make it clear that sexually oriented businesses were permitted, rather than conditional, uses agricultural areas of the City of Coates, provided that Section 522 of the Coates Zoning Code was followed.

Prior to passing Coates Zoning Code 522, the City Council at that time had an opportunity to review studies prepared by a number of U.S. cities concerning the effects of adult entertainment on their municipalities. These included:

1. Phoenix, Arizona 1979;
2. Seattle, Washington 1989;

3. Indianapolis, Indiana 1984;
4. Minnesota Attorney General 1989;
5. Rochester, Minnesota 1988; and
6. St. Paul, Minnesota 1987.

Since there has been a change in the membership of the Coates City Council since 1994, I have forwarded copies of those studies to the City Clerk for distribution to the present Council. In addition, the City Council has received a position statement prepared by McLaughlin Consulting Services, Inc. in 1998 on behalf of Jakes Ltd., Inc.

The City Attorney's office 1994 summary of the six studies listed above is attached to this Memorandum for your consideration. The Rochester, Minnesota study also contain [sic] an excellent summary of other studies on pages 5-9.

The present law firm has been representing the City of Coates since late 1993. As such, the City Attorney's office has prosecuted 38 cases since its appointment as Coates City Attorney. It seemed important for the City of Coates to know whether adult businesses, such as jakes, had an effect on the criminal activity located within the City of Coates. Much like the other studies that have been presented to the City Council, the Coates City Attorney's office finds that Jakes has had a very significant effect on both the amount of criminal activity, and the cost of criminal prosecution, within the City of Coates.

From December 1993 through September 1999, the Coates City Attorney's office has prosecuted 38 criminal cases. Seventeen (17) of those criminal cases were related to activities or customers going on at the establishment known as Jakes. That amounts to 44.7% of all the criminal cases.

Even more significant, is the total cost of criminal prosecution. The total cost of prosecution the 38 cases referred in the prior paragraph was $13,034.72. However, the costs related to prosecution [sic] the cases at Jakes totaled $9,211.70. A large part of this significance would be because two of the cases actually went through trial, thereby increasing the costs billed to the City because of the amount of time involved. When the $9,211.70 attorney's fees and costs is divided by 5.83 (representing 5 years, 10 month [sic] of legal services), the average annual amount of criminal prosecution costs related to Jakes is $1,580.05 per year.

The City Attorney's office has defined "Jakes related cases" as cases involving alleged criminal activity by Jakes customers, Jakes management, and entertainers working at Jakes as independent contractors. Consideration of Jakes related criminal activity by customers included criminal activity involving Jakes customers on their way to, while at, or after departing from Jakes.

Set forth below is a summary of the findings made by the Coates City Attorney's office by analysis of its files and billing statements prepared since December 1993 through September 1999 (5 years, 10 months). Defendants are identified by number, rather than by name or initial, as the names of the defendants are not relevant.

A more detailed description of the criminal prosecutions is found following the summary.

Jakes Related

Defendant	Offense Date	Description	Yes	No	Disposition	Cost
1	12/11/93	GM DWI	X		G	$ 128.00
2	1/13/94	DWI	X		G	$ 144.00
3	4/16/94	DWI		X	G	$ 160.00
4	5/14/94	GM DWI		X	G	$ 128.00
5	8/18/94	GM DWI		X	G	$ 20.00
6	8/19/94	Poss. Small Amt. of MJ	X		No Show	$ 140.00
7	8/19/94	Poss. Drug Paraphernalia	X		G	$ 91.00
8	8/19/94	Poss. Small Amt. of MJ	X		G	$ 166.00
9	8/19/94	Aid & Abet Bottle Club	X		Guilty Plea	$ 2,184.95
10	8/19/94	Bottle Club Operation	X		NG Decision	$ 3,123.73
11	2/24/95	GM DWI		X	G	$ 288.00
12	8/23/96	DWI		X	G	$ 317.90
13	10/19/96	Theft; Crim. Damage	X		G	$ 45.00
14	10/19/96	Theft; Crim. Damage	X		G	$ 61.50
15	10/19/96	Theft; Crim. Damage	X		G	$ 45.00
16	1/31/97	Agg DWI		X	Pending	$ 20.00
17	8/28/97	5th Deg. Asslt.	X		Dismissed	$ 569.84
18	11/26/97	DWI		X	G	$ 34.00
19	12/17/97	DWI		X	G	$ 78.90
20	1/9/98	5th Deg. Asslt.	X		Guilty Verdict	$ 1,365.23
21	1/17/98	Failure to Stop – ER		X	G	$ 191.92
22	1/17/98	Failure to Stop – ER		X	G	$ 191.91
23	3/26/98	DAS	X		G	$ 17.00
24	4/16/98	DOC	X		G	$ 8.50
25	5/4/98	Violate OFP		X	Cnt. For Dis.	$ 59.50
26	8/6/98	Careless		X	Pending	$ 29.30
27	8/13/98	5th Deg. Asslt.		X	G-DOL	$ 695.20
28	9/20/98	No Ins.; No DL	X		G-No DL	$ 12.30
29	10/15/98	5th Deg. Asslt.		X	G	$ 321.04
30	1/9/99	Fail to Yield		X	G	$ 410.80
31	2/3/99	GM DWI		X	G	$ 61.35
32	3/1/99	Crim. Veh. Operation	X		G	$ 316.50
33	3/19/99	GM 5th Deg. Assault	X		Continued for Dismissal	$ 793.15
34	4/17/99	5th Deg. Asslt.; DOC		X	G-DOC	$ 395.60
35	5/3/99	Theft; DAS		X	G	$ 334.90
36	6/17/99	DAR; Fail to Yield		X	Pending	$ 35.00
37	7/3/99	DAR; No MN DL		X	G	$ 10.00
38	7/9/99	DWI		X	Pending	$ 29.70

Total Number of Cases:	38
Jakes Related:	17
Percentage Related to Jakes:	44.74%
Total Prosecution Costs:	$13,024.72
Total Jakes Related Costs:	$9,211.70
Percentage Jakes Related Costs:	70.72%
Average costs Per Year of Jakes Related Prosecutions: (5 years, 10 months)	$1,580.05

(D = Defendant; V = Victim):

Defendant	Offense Date	Charge/Disposition
1	12/11/93	Gross misdemeanor DWI; Open Bottle; Possession of Small Amount of Marijuana; Possession of Drug Paraphernalia/Plead guilty to gross misdemeanor DWI May 19, 1994. Sheriff's Deputies were dispatched to Jakes on a report of an extremely intoxicated driver leaving the bar. Officers found D to have a blood alcohol of .17 and found an open 12-pack of beer in his vehicle together with a drug paraphernalia and a small amount of marijuana.
2	1/13/94	DWI; No MN Driver's License; No Proof of Insurance; Failure to Change Registration File closed. Sheriff Deputy received a report of a possible intoxicated driver in the median on Highway 52 south of Jakes. D was found running toward Jakes stating he was

		going to use the telephone to call a friend as he [sic] vehicle had stalled and that he had drove it into the median so as not to leave it in the traffic lane. D was found to be DWI and admitted drinking at a friend's home in Coates.
3	4/16/94	Misdemeanor DWI/Plead guilty October 3, 1994. Dakota County Sheriff's Deputies received a report of a vehicle traveling erratically. Officers located the vehicle and found the driver to be DWI.
4	5/14/94	Gross misdemeanor DWI; Plead Guilty July 21, 1994. Dakota County Sheriff's Deputy observed poor driving conduct on southbound Highway 52, initiated a traffic stop and found D to be DWI with a blood alcohol of .23. D admitted to drinking at a poker party.
5	8/18/94	Gross misdemeanor DWI; No Proof of Insurance/Plead Guilty November 7, 1994, D was stopped by a Sheriff's Deputy for speeding and found to be DWI. D admitted to drinking at Peelers in Cannon Falls.
6	8/19/94	Possession of Small Amount of Marijuana. File Closed. Sheriff Deputies were working undercover in Jakes Bar. A search

		warrant was executed by Deputies and while searching the back rooms of the bar officers observed a "bong" and one of the female strippers scraping what appeared to be a marijuana residue on a small plate. D entered the room stating that the "bong" was hers. A search of D's bag later revealed a small amount of Marijuana.
7	8/19/94	Possession of Drug Paraphernalia/Plead guilty September 21, 1994. Sheriff Deputies were working undercover in Jakes Bar. A search warrant was executed by Deputies and D was identified as one of the dancers. D gave officers permission to search her bag which revealed a "one hitter" pipe.
8	8/19/94	Possession of Small Amount of Marijuana. Plead guilty on 9/28/94. Sheriff Deputies were working undercover in Jakes Bar. A search warrant was executed by Deputies and D was identified as one of the dancers. D consented [sic] the search of her bags which revealed a small amount of Marijuana.
9	8/19/94	Disposing of Alcoholic Beverages as Part of a Commercial

		Transaction Without License; Aid & Abet the Operation of a Bottle Club Without a Permit. Pled guilty to two counts of Aiding and Abetting the Operation of an Illegal Bottle Club. Sheriff Deputies were working undercover in Jakes Bar. A search warrant was executed by Deputies where it was found that D was disposing of alcoholic beverages without a license.
10	8/19/94	Disposing of Alcoholic Beverages as Part of a Commercial Transaction Without License; Aid & Abet the Operation of a Bottle Club Without a Permit/ Acquitted. Sheriff Deputies were working undercover in Jakes Bar. A search warrant was executed by Deputies where it was alleged that D was disposing of alcoholic beverages without a license. Directed verdict for D based on lack of knowledge.
11	2/24/95	Gross misdemeanor DWI; plead Guilty February 23, 1996. Sheriff's Deputies were conducting a traffic stop when approached by a woman who stated that a vehicle had lost control, almost striking her and was in a field just south of Jakes Bar. Deputies responded to the area and found DWI.

12	8/23/96	DWI; Test Refusal/Plead guilty February 10, 1997. State Patrol Trooper responded to a 3 vehicle accident on Highway 52. D was found to be DWI and admitted drinking at a bar in West St. Paul.
13	10/19/96	Gross misdemeanor Theft; Criminal Damage to Property; Aid & Abet Criminal Damage to Property. Pled guilty to gross misdemeanor Theft 1/6/97. Dakota County Sheriff's Deputies responded to Coates Corner Store on a report of a theft in progress. D and two other suspects who had just left Jakes were arrested.
14	10/19/96	Gross misdemeanor Theft; Criminal Damage to Property; Aid & Abet Criminal Damage to Property. Pled Guilty to gross misdemeanor Theft 1/6/97. Dakota County Sheriff's Deputies responded to Coates Corner Store on a report of a theft in progress. D and two other suspects who had just left Jakes were arrested.
15	10/19/96	Gross misdemeanor Theft; Criminal Damage to Property; Aid & Abet Criminal Damage to Property. Pled guilty to gross misdemeanor Theft 1/6/97

		Dakota County Sheriff's Deputies responded to Coates Corner Store on a report of a theft in progress. D and two other suspects who had just left Jakes were arrested.
16	1/31/97	Agg. Violations; DWI; Open Bottle. Pending. D was observed speeding on northbound Highway 52 near 160th Street. D admitted drinking and an open, partially full can of beer was found under the driver's seat.
17	8/28/97	Fifth Degree Assault/Dismissed 6/1/98. D was charged with assaulting one of the dancers at Jakes for allegedly injuring one of the customers. Charges were dismissed by City Attorney's office at trial because the V was not located to testify and did not appear at trial.
18	11/26/97	DWI; Refuse to Test; Open Bottle. File closed. D was arrested for DWI after Sheriff's Deputy observed poor driving conduct on County Road 48. Mr. Zimmer told the arresting officer that he had been drinking at a bar in Coates. Open bottles of Bud Light were found in D's vehicle.

19	12/17/97	DWI; Refuse to Test; Open Bottle. Pled Guilty to Refuse to Test on July 23, 1998. D was observed speeding on southbound Highway 52 North of 170th Street. D admitted drinking and an open bottle of rum was found in D's vehicle.
20	1/9/98	Fifth Degree Assault. Found Guilty by Jury July 16, 1998. D assaulted V at jakes over use of a cellular telephone.
21 and 22	1/17/98	Failure to Stop When Signaled by an Officer. Both Defendants pled to Failure to Yield to Emergency Vehicle on June 1, 1998. Defendants were operating ATVs and failed to stop when officers activated their emergency lights near Coates Corner Store.
23	3/26/98	Driving After Suspension/ Guilty Deputy was dispatched to Jakes because of an alarm going off. D was observed driving away from Jakes, further investigation revealed that D's driving privileges were suspended.
24	6/14/98	Disorderly Conduct/Pled guilty 7/15/98. D was charged with disorderly conduct following an incident at Jake's when he refused to leave.

25	5/4/98	Violation of OFP/Matter continued for dismissal 6/17/98. D violated OFP by telephoning victim at work on several occasions and by sending two friends to victim's home to remove personal property on his behalf.
26	8/6/98	Careless Driving: No MN Driver's License. Pending. D was involved in a motor vehicle accident in the area of Highway 52 and 160th Street. It is alleged that D drove in a careless manner and did not have a MN Driver's License.
27	8/13/98	Fifth Degree Assault. Pled Guilty 11/2/98 to Disorderly Conduct. D assaulted V at V's mother's home.
28	9/20/98	No MN Driver's [sic]; No Proof of Insurance. Pled to No MN Driver's License. D is alleged to have struck a motor vehicle in the parking lot of Jakes. Further investigation revealed that D had no MN driver's license or proof of insurance.
29	10/15/98	Fifth Degree Assault. D struck V at Coates Corner Store over a debt. Plead guilty January 6, 1999.
30	1/9/99	Fail to Yield Right-of-Way. Pled Guilty 4/21/99. D pulled out on Highway 52 and was struck by a southbound vehicle.

31	2/3/99	Enhanced gross misdemeanor DWI; Test Refusal; Open Bottle/Pled July 15, 1999. A complaint was made of an erratic driver in the area of Highway 52 and 200th Street. D was found at the Coates Corner Store and is alleged to be driving under the influence of alcohol. D refused all field sobriety tests and alcohol intoxication tests.
32	3/1/99	Same Defendant 28. Gross Misdemeanor Criminal Vehicular Operation; DWI; No MN Driver's License/Pled Guilty to Criminal Vehicle Operation and No Minnesota's Driver's License on September 23, 1999. D pulled out from Clayton Avenue and was struck by truck. D had a blood alcohol of .17.
33	3/19/99	Gross Misdemeanor Fifth Degree Assault. Pled 9/28/99. D assaulted V at Jakes – unknown motive. Continued for dismissal after V moved to New York and did not appear for trial.
34	4/17/99	Fifth Degree Assault; Disorderly Conduct. Pled to Disorderly Conduct 9/20/99. D made obscene gestures to V while traveling southbound on Highway 52; V confronted D and D punched V.

35	5/3/99	Driving After Suspension; Theft; Hit & Run; No Proof of Insurance/Pled 9/9/99 to Driving After Suspension & Theft. D left Coates Corner Store without paying for gasoline and struck a metal pole in the parking lot while leaving. D's driving privileges were suspended.
36	6/17/99	Driving after Revocation; Failure to Yield Right of Way/ Pending. D is alleged to have pulled out in front of a vehicle northbound on Highway 52 from County Road 81. D's driving privileges were revoked.
37	7/3/99	Driving After Revocation; No Motorcycle Endorsement. Pled to Driving After Revocation 9/2/99. D was observed traveling on a motorcycle at 160th Street and Highway 52 without a helmet or eye protection. D's driving privileges were revoked.
38	7/9/99	Misdemeanor DWI. Pending. D is alleged to have passed out in a motor vehicle at the Coates Corner Store. D is alleged to have had a blood alcohol of .16.

CONCLUSION: Contrary to the conclusion found on page 8 of the Position Statement submitted by McLaughlin Consulting Services, Inc., the presence of adult entertainment within the City of Coates has a significant effect on the number of crimes committed within the City and the cost to the City in prosecuting those crimes.

Respectfully submitted,

Severson, Sheldon, Dougherty & Molenda, P.A.

/s/ Michael E. Molenda
By: Michael E. Molenda
Coates City Attorney

MEM/lak

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jake's Ltd., Inc., a Minnesota corporation, and Richard J. Jacobson,

Plaintiffs,

vs.

City of Coates, a municipal corporation,
Defendant.

AFFIDAVIT OF RICHARD J. JACOBSON

Court File No. 19-C4-00-6087

STATE OF MINNESOTA)
) SS
COUNTY OF HENNEPIN)

Richard Jacobson being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is one of the Plaintiffs in the above-entitled matter.

2. Your affiant is the owner of the real estate on which Jake's Bar in Coates is located and a 50% owner of the corporate Plaintiff, Jake's Ltd.

3. Your affiant has reviewed the memorandum of Michael Molenda, dated October 29, 1999, concerning the purported "effect of adult oriented business on crime and prosecution costs in the City of Coates."

4. The purported impact of Jake's on crime and prosecution costs in the city is gravely exaggerated and

such exaggeration would be readily apparent to any member of the Coates City Council.

5. Of the 17 prosecutions alleged to be "Jake's related" nearly five, or nearly one-third, arose out of the single incident.

6. Of the $9,211.70 in prosecutor costs, $5,705.68 or more than 61% arose out of the same incident.

7. That incident arose as a direct result of the litigation in *Knudtson v. City of Coates,* 519 N.W.2d 166 (Minn. 1994).

8. Until the decision of the Minnesota Supreme Court mentioned above, Jake's Bar operated pursuant to an inunction [sic] issued by the Dakota County District Court invalidating the city's refusal to renew Jake's liquor license.

9. Jake's continued to sell liquor pursuant to that inunction [sic] until August 18, 1994, when the Minnesota Supreme Court denied a petition for rehearing.

10. At the time, your affiant, then 24 years of age, managed the bar for Eileen Knudtson, who at that time owned the bar.

11. On the day the petition for rehearing was denied, your affiant, at the direction of Ms. Knudtson, removed all liquor from the premises, and packed it up for resale back to the distributors.

12. On the day after the rehearing petition was denied, August 19, 1994, your affiant, without consulting legal counsel (The bar's attorney was in California at a convention of the First Amendment Lawyers Association

at the time), or his employer, decided to permit customers to purchase liquor across the streets at Coates Corners, bring it in and consume it on the premises.

13. Your affiant was unaware of the bottle club licensing statute. Had anyone advised your affiant that it was unlawful to permit customers to bring liquor onto the premises, your affiant would have stopped doing [sic] immediately.

14. Mr. Molenda instead of advising your affiant of the requirements of the bottle club law, chose instead to seek a search warrant for the seizure of all liquor on the premises, for the seizure of all currency on the premises, and for the seizure of all business records on the premises.

15. As a result on August 19, 1994, some 20 sheriff's deputies barged into the premises, seized all the liquor that had been packed for shipment back to the distributors for resale, and seized all money on the premises, including a framed dollar bill representing the first dollar's sale at the bar.

16. During the course of the search, petty misdemeanor amounts of marijuana were found on the persons of three of the dancers.

17. The execution of the search warrant was followed by significantly overcharged criminal prosecutions. Not only was your affiant charged with violating the bottle club law, Eileen Knudtson was as well, despite her total non-involvement in the decision to allow customers to bring liquor in.

18. Ms. Knudtson was further charged with illegal liquor sale, premised upon her attempt to sell the existing inventory back to the distributors, notwithstanding the

existence of the state regulations specifically permitting such sales.

19. The criminal prosecution led to motions to suppress evidence, motions to dismiss the criminal complaint, your affiant's plea of guilty to a bottle club violation, and a judgment of an acquittal on bottle club charges against Eileen Knudtson at the end of the state's case.

20. If this single incident were removed from the calculation, there would be only 33 incidents, and 12 would be Jake's related. Even in some of the remaining 12, the relationship to Jake's is strained at best. For example:

a. A DWI no Minnesota Driver's License, no proof of insurance and failure to change registration charge is attributable to Jake's because a driver with a stalled vehicle on Highway 52 was walking toward Jake's to use the phone.

b. An incident on 3/26/98 is attributable to Jake's because an alarm had gone off. However, at that time Jake's did not have a burglar alarm. No alarm was installed until early in the year 2000. The only alarm they could have responded to was one at Coate's Corner, across the street.

c. An incident on 3/1/99 is attributed to Jake's, apparently because it involved the same Defendant who had earlier struck a motor vehicle in Jake's parking lot some seven months earlier, and was involved in a traffic accident at the intersection of Clayton and Highway 52.

21. If these highly dubious incidents were removed from the calculation, Jake's would be responsible for only 9 of 33 criminal prosecutions over five years. Given the fact that there are three commercial establishments within the

city at which crimes are likely to occur, being responsible for fewer than one-third of the crimes clearly indicates no particular negative secondary effects from Jake's being there.

22. Your affiant executes this affidavit in opposition to Defendant's motion for summary judgment.

/s/ Richard J. Jacobson
Richard J. Jacobson

Subscribed and sworn to
before me this 28th day of
September, 2000.

/s/ Michelle A. Hreha
Notary Public

[SEAL]
MICHELLE A. HREHA
NOTARY PUBLIC MINNESOTA
MY COMMISSION
EXPIRES JAN 31, 2005

Supreme Court, U.S.
FILED
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CLERK

No. 02-187

In The

Supreme Court of the United States

JAKES, LTD., and RICHARD J. JACOBSON,

Petitioners,

vs.

CITY OF COATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT CITY OF COATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Eighth Circuit's decision upholding the amortization provision in the City's zoning ordinance consistent with this Court's ruling in *City of Renton v. Playtime Theaters, Inc.* and *City of Erie v. Pap's A.M.*?

2. Is the Eighth Circuit's decision upholding the validity of the City's licensing ordinance consistent with this Court's decision in *FW/PBS, Inc. v. City of Dallas* and *City of Los Angeles v. Alameda Books, Inc.*?

3. Does Petitioners' challenge to the Minnesota statute permitting amortization of sexually oriented businesses raise any constitutional issue?

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JURISDICTIONAL STATEMENT

The Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court in this matter on March 26, 2002. The Eighth Circuit denied Petitioners' Petition for a Rehearing and a Rehearing en banc on May 3, 2002. The Petition for Writ of Certiorari was docketed on August 7, 2002.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First Amendment to the United States Constitution: "Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech. . . . "

City of Coates Ordinances 36, 40, and 41

STATEMENT OF THE CASE

1. Factual Recitation

Petitioner Richard J. Jacobson is the President and fifty percent owner of Petitioner Jake's Ltd., Inc., a Minnesota corporation that operates a business known as Jake's Bar. (A50) Jakes, which features live nude dancing, opened in the City of Coates in January 1992. (A50)

In June 1994, the City adopted Ordinance 21, which amended the City's Zoning Ordinance by adding Section 522 regulating sexually oriented businesses. (A50) Section 522 required sexually oriented businesses to be located in agricultural districts and required them to be located at least 750 feet from any other sexually oriented businesses

and 750 feet from certain protected uses, including single family dwellings, residentially-zoned property, and public parks. (A52) Jakes violated Section 522 because the business was not located in an agricultural zone and because it was within 750 feet of a single-family dwelling. Section 522 contained a "grandfather" provision that allowed Jakes, as a preexisting nonconforming sexually oriented business, to remain at its existing location until December 31, 1996. (A54)

Petitioners filed a previous lawsuit challenging the City's 1994 ordinance. (A56) In that lawsuit, the district court declared the City's ordinance unconstitutional because of a requirement that a portion of any new subdivision of land be donated as park land, which would not leave any site where Petitioners could lawfully relocate their business. (A3) The district court stated, however, that if the City changed its ordinance to eliminate the offending provision, the zoning ordinance would pass constitutional muster. (A3)

In response to the district court's ruling in the previous lawsuit, the City Council adopted Ordinance 31, which amended the City's subdivision regulations to eliminate the park dedication requirement for non-residential property. (A56) The City Council also adopted Ordinance 32, which amended Section 522 by changing the date by which sexually oriented businesses needed to come into compliance from December 31, 1996 until December 31, 1999. (A56)

On December 13, 1999 the City adopted Ordinance 36. (A56) That ordinance imposed licensing requirements and other regulations on sexually oriented businesses. With respect to live adult entertainment, the regulations, among

other things, required the dancers to be no closer than six feet from any patron and prohibited dancers from soliciting tips from customers. (A60)

2. Procedural Posture

Petitioners commenced this lawsuit on December 29, 1999 challenging the validity of Ordinances 31, 32, and 36. Petitioners alleged that Ordinances 31 and 32 were invalid under state law because they were adopted without complying with the published notice and hearing requirements contained in Minnesota Statutes, Section 462.357, Subd. 3 and because the amortization provision in Ordinance No. 32 violated Minnesota Statutes, Section 462.357, Subd. 1c. (A61) Petitioners also contended that the amortization provision in Ordinance No. 32 violated the First Amendment because: (1) it was enacted without an empirical basis for believing that Petitioners' business caused adverse secondary effects; (2) it would have the effect of suppressing or greatly reducing access to constitutionally protected speech; and (3) it did not have the effect of reducing adverse secondary effects. (A63)

Petitioners contended that Ordinance No. 36 was facially unconstitutional and unconstitutional as applied to their business because, among other things: (1) it constituted an unlawful prior restraint; (2) it vested impermissible discretion to the City; (3) it failed to provide procedural due process; (4) the disqualification based upon prior criminal convictions was an unlawful prior restraint; and (5) the provision requiring a six-foot separation distance between the dancers and the patrons was a form of content-based censorship. (A64)

Because of Petitioners' allegations with respect to the procedural defect in the City's adoption of Ordinance 31, the City Council adopted Ordinance 40, which repealed Ordinance 31 and re-adopted Section 522 of the City Code in its entirety (A219), and Ordinance 41, which adopted the same amendment to the subdivision regulations that had been adopted by Ordinance 32. (A20)

Both Petitioners and the City moved for summary judgment. (A15) The district court (the Honorable Donovan W. Frank) upheld the constitutionality of Ordinances 36, 40 and 41. (A37) The district court trial court denied Petitioners' motion for amended findings and granted the City's request for a revised order enjoining Petitioners from operating a sexually oriented business at its current location. (A39) The court granted Petitioners' motion for a stay of the trial court's order pending appeal. (A39)

The Eighth Circuit affirmed the district court decision with one slight modification. (A1)

REASONS FOR DENYING THE WRIT

1. The Eighth Circuit's Decision Upholding the Amortization Provision in the City's Zoning Ordinance as a Valid Time, Place and Manner Restriction is Consistent with This Court's Ruling in *City of Renton v. Playtime Theatres, Inc.* and *City of Erie v. Pap's A.M.*

The threshold inquiry in a First Amendment case involving a challenge to a zoning ordinance is whether the legislation is a content-based restriction or a content-neutral time, place, and manner restriction. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v.*

American Mini Theatres, Inc., 427 U.S. 50 (1976). Regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment, while content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. In *Renton*, this Court defined "content-neutral" regulations as ones that "are *justified* without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48 (emphasis in original). Because the stated purpose of the ordinance at issue in *Renton* was to address the secondary effects of adult businesses, this Court concluded that the zoning ordinance was not content-based but rather content-neutral. *Id.*

The second prong of the *Renton* test is to determine whether the ordinance serves a substantial governmental interest. To satisfy this prong, a municipality must show that the ordinance is aimed at the negative secondary effects of adult uses rather than the content of the speech. A city may rely on the secondary effects studies of other cities as evidence of secondary effects when drafting its ordinances. This Court held in *Renton* that a municipality is *not* required to "conduct new studies or produce evidence independent of that generated by other cities or towns, so long as whatever evidence the municipality relied upon is *reasonably believed* to be relevant to the problem sought to be addressed." *Id.* at 51-52 (emphasis added).

The "reasonably believed" factor in the second prong of the *Renton* test does not require a city to prove negative secondary effects. In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), this Court recently affirmed the evidentiary

standard in *Renton* and once again held that cities do not need to prove adverse secondary effects, but rather may rely on the experience of other cities.[1] In *Erie*, this Court upheld an ordinance banning nudity in public places where the city relied on the secondary effects studies of other cities. Citing the "reasonably believed" test from *Renton*, this Court held that

> [b]ecause the nude dancing at Kandyland is of the *same character* as the adult entertainment at issue in *Renton*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) . . . and *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390 (1972), it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* . . . to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood.

Erie, 529 U.S. at 296-97 (emphasis added) (citing *Renton*, 475 U.S. at 51-52). *Erie* confirms that studies upon which cities rely do not have to be directly on point in order to pass the narrow tailoring test. If the adult use is of the same character and a city "reasonably believes" that the activity may cause some of the negative secondary effects set forth in the studies, an ordinance will pass constitutional muster. *See also Young*, 427 U.S. at 71 (An ordinance need not adopt the least restrictive alternative and

---

[1] Although the Court analyzed the ordinance in *Erie* under the four-part test in *United States v. O'Brien*, 391 U.S. 367 (1968), the Court noted that "the evidentiary standard described in *Renton* controls here." *Erie*, 529 U.S. at 297.

"must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.").

The third prong of the *Renton* test is to determine whether the ordinance provides a reasonable alternative avenue of communication. This prong is satisfied by providing adult uses with a reasonable opportunity to locate within the city. *Renton*, 475 U.S. at 53.

Petitioners make absolutely no showing as to how the amortization provision in the City's ordinance conflicts with the *Renton* or *Erie* decisions. An amortization provision is not a provision regulating adult uses. Rather, it is merely a land use tool that requires adult businesses to come into compliance with the City's substantive regulations by a specified time. Petitioners do not challenge any of the substantive regulations in the City's zoning ordinance. An amortization provision is not governed by the *Renton* standards, and Petitioners cite no decisions of this Court or any Circuit Court to the contrary.

2. The Eighth Circuit's Decision Upholding the Validity of the City's Licensing Ordinance is Consistent with This Court's Decision in *FW/PBS, Inc. v. City of Dallas* and *City of Los Angeles v. Alameda Books, Inc.*

A licensing regulation pertaining to sexually oriented businesses is not an unconstitutional prior restraint on speech if the regulations contain safeguards that minimize the possibility that the licensing procedure will be used to suppress speech. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). In *FW/PBS*, the Court established three

requirements for licensing ordinances governing sexually oriented businesses:

> 1. The licensing scheme cannot grant unbridled discretion to a governmental official or agency;
>
> 2. The licensing scheme must set forth specific and reasonable time limits during which the decision-maker must make the decision on whether to grant or deny the license; and
>
> 3. The licensing scheme must provide an opportunity for prompt judicial review of a decision not to grant a license. *Id.* at 225-27.

Petitioners make no attempt to show how the Eighth Circuit's decision on the licensing ordinance violates the *FW/PBS* standard. To the contrary, Petitioners admit that the Eighth Circuit reached a result similar to that reached by this Court in *FW/PBS*. (Petition, at 25)

With respect to whether the licensing ordinance grants unfettered discretion to the City, Petitioners rely solely on a provision in the ordinance dealing with suspension of licenses. (Petition, at 22-23) That provision is not applicable to the facts of this case, which involves the issuance of a new license, not the suspension of an existing license. Such an issue hardly rises to the threshold of an "important matter" contemplated in Rule 10.

With respect to the provision establishing a license fee, the Eighth Circuit decision is consistent with this Court's decision in *Murdock v. Pennsylvania*, 319 U.S. 105, 115-16 (1943). In *Murdock*, this Court held that a licensing fee for a First Amendment protected activity must be revenue neutral and may not be a charge for the privilege of exercising a constitutional right. The Eighth Circuit

correctly held that Petitioners' submitted no evidence to the trial court to support their contention that the City's fee was anything other than revenue neutral.

Petitioners' challenge to the provision requiring a six-foot separation between dancers and patrons and a prohibition on tips is consistent with every other Circuit Court decision on this issue. (*See* cases cited by Eighth Circuit; A12) Petitioners' contention that this Court's decision in *City of Los Angeles v. Alameda Books*, 535 U.S. ___, 122 S.Ct. 1728 (2002) requires a trial on the six-foot separation requirement and the prohibition of payment of gratuities is misplaced for at least two reasons. First, unlike the facts in *Alameda Books*, this case was decided on cross-motions for summary judgment. Neither the City nor Petitioners contended that there were any triable issues of fact. In light of that procedural background, any issues that Petitioners now raise with respect to the trial court's decision on the summary judgment motion certainly do not rise to the level required by Rule 10. In addition, as stated above, the Eighth Circuit decision on this issue is consistent with every other Circuit Court decision on the issue.

3. Petitioners' Challenge to the Validity of the Minnesota State Statute Permitting Amortization of Adults Only Businesses Raises No Constitutional Issue.

The Eighth Circuit concluded that Petitioners' arguments with respect to the Minnesota state statute authorizing use of amortization for adult businesses was "a jumble of federal and state law concepts." (A9) Their petition continues to muddle these concepts. The state statute is merely an enabling act allowing municipalities to use amortization for adult businesses. Nothing in this

Court's decision in *Alameda Books* or any Circuit Court decision requires that an enabling statute be adopted only after empirical evidence is presented of secondary effects. Amortization provisions have uniformly been upheld in adult use cases without any showing of empirical evidence of adverse secondary effects. *Ambassador Books & Video, Inc.*, 20 F.3d 858 (8th Cir. 1994); *Holmberg v. City of Ramsey*, 12 F.3d 140 (8th Cir. 1994) Petitioners cite no decision of this Court or any Circuit Court to the contrary.

The Eighth Circuit held that the state statute allowing amortization of adult businesses was valid under a deferential, rational-basis review standard. (A9) Petitioners contend that this conclusion is at odds with this Court's decision in *Alameda Books* and the Eleventh Circuit's decisions in *Ranch House, Inc. v. Amerson*, 238 F.3d 1273 (11th Cir. 2001) and *Flanigan's Enterprises v. Fulton County*, 242 F.3d 976 (11th Cir. 2001). What Petitioners ignore, however, is that none of those decisions involved a state zoning-enabling statute. Rather, they all involved substantive regulations dealing with adult businesses and therefore are not controlling on this issue.

CONCLUSION

For the reasons set forth above, the City respectfully requests that the petition for writ of certiorari be denied.

Dated September 6, 2002.

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IN THE
SUPREME COURT OF THE UNITED STATES

Jakes, Ltd., and Richard J. Jacobson,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. The "adults-only" exemption to the otherwise absolute prohibition on amortization of non-conforming uses is unconstitutional under the First and Fourteenth Amendments to the United States Constitution. 1

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INTRODUCTION

This brief is submitted for the limited purpose of replying to Respondent's brief in opposition to petition for writ of certiorari, dated September 6, 2002. To the extent that any argument set forth in said brief in opposition is not specifically addressed in this reply brief, such omission should not be considered in agreement with or concession of the validity of said argument, but rather as only reflecting Petitioners' position that the argument is dealt with adequately in the original petition.

ARGUMENT

I. THE "ADULTS-ONLY" EXEMPTION TO THE OTHERWISE ABSOLUTE PROHIBITION ON AMORTIZATION OF NON-CONFORMING USES IS UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As noted in the original petition, Minn. Stat. Sec. 462.357, Subd. 1c absolutely prohibits municipalities from enacting, amending or enforcing municipal ordinances calling for the elimination of non-conforming uses by amortization, but exempts therefrom "adults-only bookstores, adults-only theaters, or similar adults-only businesses, as defined by

ordinance." As also noted in the original petition, this "adults-only" exemption to the amortization was enacted without any legislative findings that it was necessary to combat adverse secondary effects, and without any indication in the legislative history that the enacting legislature considered any evidence whatsoever of adverse secondary effect.

In response, Respondent asserts that it need not justify such an exemption under First Amendment standards, since it is only a "enabling" statute authorizing municipalities to amortize non-conforming adult uses, a power which they had prior to the enactment of the statute.

The argument ignores two significant facts:

First of all, although it is undisputed that, prior to the enactment of the statute, municipalities had the power to amortize non-conforming adult uses, [1] the simple fact is that, prior to the enactment of the statute, municipalities had the unlimited authority to amortize all non-conforming uses, of which adult uses were only one. Compare *AVR, Inc. v. City of St. Louis Park*, 585 N.W. 2d 411 (Minn. App. 1998), pet. for

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1See *Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F. 3d 858 (8th Cir. 1994), and *Holmberg v. City of Ramsey*, 12 F. 3d 140 (8th Cir. 1994).

rev. denied (Minn. Dec. 15, 1998). Consequently, the effect of Minn. Stat. Sec. 462.357, Subd. 1c was not to enable the amortization of non-conforming adult uses, but to prohibit the amortization of any non-conforming use, exempting only uses entitled to First Amendment protection, defined solely on the basis of the content of constitutionally protected speech.

Secondly, because the only exemption to the prohibition on amortization involves constitutionally protected speech, defined by content, [2] plainly, whether or not it is labeled "enabling statute" or a direct regulation of speech, it is clear that it must be subject to scrutiny under the First Amendment, either strict scrutiny if based on objection to the content of speech, or at least, intermediate scrutiny, if based upon a concern over adverse secondary effects.[3]

For example, assume that statute, instead of exempting

2As noted in the original petition, if such a definition is not "content-based," it is at least "content-correlated," as that term was defined by Justice Souter in *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728, 1746 (May 13, 2002) Souter J. dissenting.

3Curiously, Respondent cites no authority whatsoever for the Eighth Circuit's assertion that such a "content-correlated" exemption is entitled to only "deferential rational basis" scrutiny. Appellant's Appendix at A.9, 284 F. 3d at 889.

only adults-only businesses from the otherwise absolute prohibition on amortization, exempted "mosques" or "buildings owned by the Communist Party of the United States," so that the content of one's religious practices or political beliefs determined whether a land use was subject to amortization. Plainly, there would be no question under such circumstances that the exemption would be subject to strict scrutiny as content-based discrimination, unless an affirmative showing were made that mosques or Communist Party headquarters caused adverse secondary effects which differed in degree or in kind from the secondary effects caused by uses whose amortization was prohibited. Exemption in the instant case, is likewise content correlated, and no showing has been made as to adverse secondary effects. This plainly raises a substantial federal question upon which this Court should rule.

II. A SUBSTANTIAL QUESTION EXISTS AS TO THE GRANT OF SUMMARY JUDGMENT ON THE CONSTITUTIONALITY OF THE AMORTIZATION ORDINANCE ITSELF.

In addition to challenging the constitutional validity of the statute which permits the amortization of adult uses alone, Petitioners asserted that a substantial question exists as to the validity of the amortization ordinance itself, especially given this

Court's holding in *Alameda Books*, and Petitioners' evidentiary showing that their use had caused no adverse secondary effects in eight years of existence. In response, Respondent advances two arguments, both of which are transparently without merit.

First of all, Respondent argues that because the use was similar in nature to other types of adult uses found to cause adverse secondary effects, the city "reasonably believed" that the activity may cause the negative secondary effects caused in the studies it relied upon, rendering the ordinance constitutional under *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). What the argument ignores is this Court's clear holding in *Alameda Books*, that the "reasonable belief" is not the end all of the constitutional examination. Rather, as indicated in the plurality opinion of Justice O'Connor, even where the city passes the minimal constitutional scrutiny required under *Renton*, an adult business may challenge that "reasonable belief" by making an evidentiary showing either that the studies relied upon by the city are unreliable, or, in the alternative, by presenting affirmative evidence of the absence of secondary effects. If either such a showing is made, the burden shifts to the city to rebut the evidentiary showing. See *City of Los Angeles v. Alameda Books*, 122 S. Ct. 1728, 1736 (May 13,

2002). Given the fact that in *Alameda Books* type of showing was plainly made by Petitioners in the instant case, the reliance upon "reasonable belief" by both the District Court and the Eighth Circuit was unjustified.[4]

Respondent's second argument is evenmore lacking in merit. Respondent asserts that so long as the substantive zoning regulations are constitutional, amortization is "merely a land use tool" and thus "is not governed by *Renton* standards..." The assertion is outrageous. If anything, amortization provisions should be subject to stricter scrutiny than prospective zoning ordinances of a nature upheld in *Renton* and in *Young v. American Mini-Theaters*, 427 U.S. 50 (1976). The reasons therefor were plainly set forth by this Court in the *Young* plurality. In that opinion, this Court stated:

> "The situation would be quite different is the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically

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4As noted in the original petition, granting certiorari, vacating the Eighth Circuit's decision and remanding it for reconsideration in light of *Alameda Books* would clearly be an appropriate disposition in light of the fact that the *Alameda Books* decision was not rendered until after the Eighth Circuit decided this case.

> found that '[t]he Ordinances do not affect the operation of existing establishments, but only the location of new ones [Citation omitted, emphasis supplied.]'"427 U.S. at 71, n. 35.

Commenting upon this observation, the Ninth Circuit in *Walnut Properties, Inc. v. City of Wittier,* 861 F. 2d 1102, 1110 (9th Cir. 1988), stated, "There is little doubt that a majority would have questioned an ordinance putting all existing theaters out of business." [Citation and footnote omitted.]"

Obviously, since an amortization ordinance does not merely prospectively restrict the location of new adult establishments, but puts existing businesses out of business at their present locations, it has, if anything, a far greater potential for content-based censorship than a prospective zoning ordinance such as these in *Young* or *Renton*. It therefore, must be subject to stricter, not lesser scrutiny. Likewise, in *XLP Corp. v. County of Lake,* 743 N.E. 162, 170 (Ill. App. Dist. 2000), the court plainly noted the difference between an amortization ordinance and a prospective zoning ordinance, stating:

> "In *Renton*, there were no adult businesses in existence at the time the city enacted its ordinance. Consequently, the Supreme Court determined that the City of Renton could rely on

> the experiences of other communities, in particular those of Seattle, which had conducted detailed studies of adult use businesses, to adopt its ordinance. Here, however, where Plaintiffs had been in business for 15 years at the time Defendant enacted its ordinance, Plaintiffs' allegation that Defendant wrongly relied on outside studies instead of considering Plaintiffs' existing businesses to determine whether such businesses cause adverse secondary effects presented an issue of fact."

Finally, it should be noted that even prior to the enactment of Minn. Stat. Sec. 462.357, Subd. 1c, amortization of non-conforming uses had been the exemption in Minnesota, rather than the rule. See for example, *Freeborn County v. Claussen*, 295 Minn. 96 (1972), and *Oswalt v. County of Ramsey*, 371 N.W. 2d 241 (Minn. App. 1985), holding that non-conforming uses legal at the time a zoning ordinance is adopted or amended must be permitted to remain or eliminated by use of eminent domain. Consequently, the only time amortization was ever invoked was when a non-conforming use caused adverse secondary effects. Compare for example, *AVR, Inc.*, supra, in which the amortization of a non-conforming ready mix plant was upheld, under a rational basis-standard, while non-conforming liquor establishments were allowed to

remain, only upon an evidentiary showing that the ready mix plant caused dust, pollution, and noise not caused by the bars. See *AVR, Inc.*, supra, 585 N.W. 2d at 417.

As a result, in order to assure that the "adults-only" exemption was not enacted on the basis of objection to the content of constitutionally protected speech, it is plainly insufficient to show that adults-only businesses cause adverse secondary effects; any use subject to amortization has traditionally been so subject only because of adverse secondary effects caused. Rather, in order to justify the "adults-only" exemption to amortization under a *Young, Renton* or *Alameda Books* rationale, an evidentiary showing must be made that "adults-only" uses as defined in the statute cause adverse secondary effects which differ in either degree or in kind from those non-conforming uses whose amortization is now prohibited by statute. No such showing has been made.

CONCLUSION

For all of the forgoing reasons, as well as those reasons set forth in the original petition, the relief sought in the petition

for writ of certiorari should be, in all respects, granted.

Respectfully submitted,

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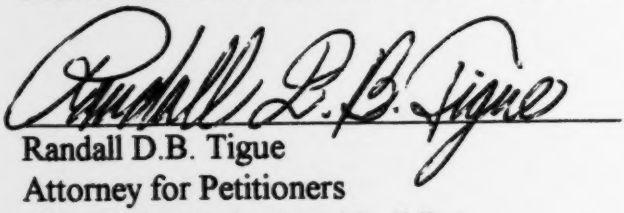

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